Petition

81-182

No.

Office-Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

In 1981, for the first time in California history, an extensive state servitude was imposed on the shorezone between the high and low water marks at Lake Tahoe. Petitioners own land in this shorezone in fee simple. In imposing this servitude, the California Supreme Court relied on *Illinois Central v. Illinois* (1892) 146 U.S. 387, stating: "In our view *Illinois Central* . . . the 'seminal case on the scope of the public trust doctrine' . . . settled the issue . . ."

I. Does *Illinois Central* establish a federal common law rule restricting the states' power to determine rights and title to navigable lakes and rivers and the adjoining lands?

II. If *Illinois Central* establishes a federal common law rule:

(1) Does this rule only restrict the states' power to impair the public's use of the navigable *waters*; or

(2) Does this rule also restrict the states' power to determine rights and title to the *lands* underlying navigable waters up to the high water mark?

III. Are Petitioners' rights under the Due Process and Just Compensation Clauses violated by the Court's decision imposing an extensive state servitude (which includes opening Petitioners' lands to the public) where the ruling was unpredictable in terms of relevant precedent and contrary to property interests created by state law?

PARTIES

Petitioner is Tahoe Shorezone Representation, a nonprofit corporation of Lake Tahoe property owners. Tahoe Shorezone Representation has no parent or subsidiary corporations or affiliates.[1]

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[1]Respondents are State of California; State Lands Commission of the State of California; Kenneth Cory, State Controller, Chairman of the State Lands Commission; Mervyn M. Dymally, Lieutenant Governor, Commissioner of the State Lands Commission; Roy M. Bell, Director of Finance, Commissioner of the State Lands Commission; William F. Northrop, Executive Director of the State Lands Commission; Evelle J. Younger, Attorney General of the State of California; J. F. Trout, Manager, Land Operations of the Division of State Lands. Additional Real Parties in Interest below, also Petitioners here, are: Charles F. Fogerty, Stella Fogerty, Russell S. Grove, Nancy J. Gorve, Harold E. Ebright, Jr., Katherine Fairlie Ebright, George Hilton Edmondson, Janet Louise Edmondson, Laurence L. Lindsey, Jr., Rosemary F. Lindsey, Homer M. Hayward, Reid W. Dennis, and Tahoe Meadows, a California corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINIONS BELOW

The opinion of the California Supreme Court in *State of California v. Superior Court (Fogerty)* is reported at 29 Cal.3d 240, 625 P.2d 256, and 172 Cal.Rptr. 713 (1981) (Appendix A); the opinion of the California Supreme Court in *State of California v. Superior Court (Lyon)* is reported at 29 Cal.3d 210, 625 P.2d 239, and 172 Cal.Rptr. 696 (1981) (Appendix B).[a]

JURISDICTION

The opinion and order issuing a peremptory writ of mandate by the California Supreme Court was entered on March 20, 1981. A timely petition for rehearing was denied on April 29, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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[a]The opinion in *Lyon*, a companion case, is necessary to ascertain the grounds of the *Fogerty* opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 830 of the California Civil Code provides:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

The Fifth Amendment to the United States Constitution provides in relevant part:

> . . .; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 670 of the California Civil Code; Section 2077 of the California Code of Civil Procedure (Appendix C).

STATEMENT OF THE CASE

From California's statehood in 1850 owners of lakefront property at Lake Tahoe (and all other California non-tidal, navigable waters) held fee simple absolute title to the *land* down to the natural low water mark insofar as

the State or "public" was concerned. In 1981, the California Supreme Court imposed the tidelands trust servitude[3] on the land between the high and low water marks of California's non-tidal navigable waters[4] stating that "the exercise of the police power has proved insufficient to protect the shorezone." (*Fogerty* at 247; App. A-8). The tidelands trust servitude, as defined by the California Supreme Court subjects the "tidelands" to a "trust for the public, for their use for commerce, navigation, fishing, recreation or for the purpose of preserving the property in its natural state." (*Marks v. Whitney* (1971) 6 Cal.3d 251.) The Court described its ruling as "a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California . . ."[5] including "34 navigable lakes and 31 navigable rivers." (*Fogerty* at 245; App. A-4).[6]

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[3]"Tidelands Trust" is the term traditionally used by California courts. (*People v. California Fish* (1913), 166 Cal. 576; *City of Berkeley v. Superior Court* (1980), 26 Cal.3d 515; *Marks v. Whitney* (1971), 6 Cal.3d 251, 257.) This state interest is frequently described as a servitude or easement. (*People v. California Fish* (1913), 166 Cal. 576, 583, 584, 585, 589, 590, 591, 592, 593, 594, 595, 598, 612; *City of Long Beach v. Mansell* (1970), 3 Cal.3d 462, 482, 485; *Marks v. Whitney* (1971), 6 Cal.3d 251, 257, 259, 260, 261, 262, 263.)

[4]*State of California v. Superior Court* (*Fogerty*) (1981) 29 Cal. 3d 240 (Lake Tahoe); *State of California v. Superior Court* (*Lyon*) (1981) 29 Cal.3d 210 (Clear Lake). All citations to *Lyon* and *Fogerty* are to the official reporter, 29 Cal.3d and Appendices A and B.

[5]The shorezone of the California side of Lake Tahoe is approximately 42 linear miles; Clear Lake in excess of 100. The owners of the balance of the "4000 lineal miles" of shorezone were not parties in either case.

[6]In 1972, the California State Lands Commission (Commission) issued a list of lakes and rivers which it described as "navigable." (State's Petition for Mandamus, California Supreme Court, p. 4.) "34 navigable lakes and 31 navigable rivers" were listed and it appears to be the source of the Court's reference although the mileage claims differ slightly.

Never before in California's 131 year history had this servitude been applied to the shorezone of non-tidal, navigable lakes or rivers.[7] In holding the servitude "is applicable to *non-tidal* waters" (our emphasis) the court stated:

> "... In our view, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387, which we described in *City of Berkeley* as the 'seminal case on the scope of the public trust doctrine' (26 Cal.3d at p. 521), settled the issue. ..." (*Lyon* at 227; App. B-21).

Prior to these 1981 decisions, the upland owners' rights to the exclusive use and possession of the shorezone, exactly as claimed in this litigation, were undisputed. This complete ownership of the shorezone was understood by the community generally and relied upon by property owners. These rights were consistently and frequently recognized and confirmed by the legislative,[8] executive[9] and

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[7]As observed by the dissent in *Lyon:*

> "Historically, the trust has not been applied to land between high and low water mark on navigable lakes and streams (the shorezone). . . . To apply that doctrine for the first time today casts clouds on thousands if not millions of land titles and uses, ..." (*Lyon*, at 233; App. B-30).

[8]For example, California Civil Code § 830, as amended in 1874, reads in pertinent part:

> "... the owner of the upland ... when it borders upon a navigable lake or stream, where there is no tide, ... takes to the edge of the lake or stream, at low-water mark; ..."

[9]*Lyon*, for example, refers to Commission files which "contain hundreds of letters stating or implying that the State's ownership extends waterward of the ordinary low water mark ..." (*Lyon* at 225; App. B-17). These letters contain no reference to any state interest *landward* of the "ordinary low water mark."

Between 1916 and 1964 the Attorney General issued five official opinions interpreting Cal. Civ. Code § 830 as limiting the State's

judicial[19] branches of California state government. *Lyon* acknowledges the ". . . failure of the state to previously assert its trust rights in the lands below high water. . . ." (*Lyon* at 231; App. B-27).

The owners of lake frontage at Lake Tahoe have exercised their rights and privileges in the shorezone in a variety of ways. Much of the shorezone includes water-related improvements, such as piers and boathouses—some commercial and some strictly for private use and enjoyment. Many lakefront owners have chosen to leave their shorezone in a relatively natural state. Most homes are oriented toward the lake enhancing the families' use of their lakefront location. Particularly in the case of the hundreds of residential uses, they have protected their privacy and security by exercising their "right to exclude others."

The owners of the shorezone have accepted the normal burdens of fee ownership, including paying property taxes and maintaining the area.

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interest to the low water mark. 43 Ops. Cal. Atty. Gen. 291, 292, 295, 296 (1964); 30 Ops. Cal. Atty. Gen. 262, 269 (1957); 23 Ops. Cal. Atty. Gen. 306, 307, 309 (1954); 23 Ops. Cal. Atty. Gen. 97, 98 (1954); Ops. Cal. Atty. Gen. No. 3100, pp. 5-6 (1916). In 1964, the Attorney General advised: "[I]t is now settled law in California that private ownership extends to the low water mark of non-tidal navigable waters." 43 Ops. Cal. Atty. Gen. 291, 295 (1964). As observed in *Lyon:* "In *United States v. Gossett* (9th Cir. 1969) 416 F.2d 565, 568-569, the court classified California as a low water jurisdiction, apparently based largely upon the disclaimer by California's Attorney General to ownership of the state above that line." (*Lyon* at 224; App. B-16). The *Gossett* court, however, did not rely exclusively on the Attorney General's disclaimer. Rather, the court analyzed the California law on the issue of whether the State owned to the high or low water mark on non-tidal navigable waters and concluded: "California had a choice and adopted the low water mark." *Gossett, supra* at 569.

[19]*Foss v. Johnstone* (1910) 158 Cal. 119, 127; *Anderson v. Trotter* (1931) 213 Cal. 414, 420; *City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460; *Crews v. Johnson* (1962) 202 Cal.App.2d 258. (See concurring and dissenting opinion of Paras, J., App. E)

Property owners associations, composed of thousands of families whose homes do not border the lake, own lake frontage improved with water-related facilities and beaches for the exclusive use of the members and their guests.

The California counties of Placer and El Dorado are among other public owners of lakefront property at Lake Tahoe.[11]

By letter of March 8, 1977, the California Attorney General, notified the Commission of a reversal of the previous position of that office, recognizing the "current position with respect to inland navigable water boundaries is inconsistent with that taken by this office and the Commission" in the past. The Attorney General advised:

> 1. In general, the State of California's sovereign ownership of the lands underlying navigable lakes and nontidal, navigable rivers extends landward to the ordinary high-water mark.
>
> 2. Irrespective of whether State's title to such lands extends landward to that line or merely to the ordinary low-water mark, the strip of lands between the two lines is subject to the common-law public trust for commerce, navigation and fisheries.

The Attorney General added, ". . . we recommend the following course of action:"

* * *

> 2. Notice should be given to presently or potentially affected private upland owners and members of the general public with respect to the State's position . . .[12]

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[11]Of the 71 miles of shoreline in California and Nevada, 22 miles are publicly owned.

[12]In March of 1977, the Attorney General published a "Notice of Reexamination of Statements, or Assumptions, in Prior Opinions," advising that his position in pending litigation was contrary to all five prior Attorney General opinions. (See fn. 9, *supra*.)

After the Attorney General's "recommendation" the Commission scheduled a meeting for March 31, 1977, to instruct its executive officer to "give appropriate notices [including recording the claims] . . . that the State claims ownership of the beds of all inland, nontidal navigable water landward to the high water mark." The Commission did not follow the Attorney General's advice in all respects since the instruction to the executive officer did not include notice of the "common-law public trust" claim.

On March 30, 1977, Tahoe Shorezone Representation[13] (Petitioners) filed suit against the State of California and several state officials alleging that State claims violated Petitioners' Fifth and Fourteenth Amendment rights. (Appendix F.) (The State's demurrer alleged the Petitioners' property was subject to a "public trust" citing *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387.) The same day a temporary order restrained the State from recording its claims. After a hearing, the trial court issued a preliminary injunction forbidding the recording of the State's claims.

The State appealed this order. The appellate court decision upheld the lower court ruling and remanded for further proceedings. (Appendix E.) One of the three justices concurred in the majority's conclusion that the preliminary injunction was properly granted because of the "reasonable probability that plaintiffs will ultimately prevail on the merits" but was "not prepared to end the matter thus." He stated:

> Because I view the ownership issue, on the merits, as a pure question of law with a very clear answer, [Petitioners prevail] in the interest of judicial economy, I would resolve it here and now. No further evi-

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[13]This voluntary organization consists of a large percentage of the owners of lakefront property at Lake Tahoe.

> dence or hearing in the trial court could possibly change the result. (App. E.)

On remand to the trial court, motions for summary judgment on the issues of fee ownership and the tidelands trust servitude were filed by Petitioners and the State. After a hearing, the trial court issued the following order:

> IT IS ORDERED that plaintiffs' [owners'] motion herein is granted and the following matters are found to be without substantial controversy and shall be deemed established for all purposes of this action:
>
> 1. That no portion of the subject property landward of the last natural low water mark of Lake Tahoe is, or ever was, sovereign property of the State of California; and
>
> 2. That no portion of the subject property landward of the last natural low water mark of Lake Tahoe is, or ever was, subject to the common law public trust for commerce, navigation and fisheries.
>
> IT IS FURTHER ORDERED that defendants' [State's] motion herein is denied.

The State petitioned the California Supreme Court contending *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, imposed the servitude on Petitioners' land. Petitioners argued *Illinois Central* did not apply and continued to assert their constitutional rights. (Appendix G, H and I.)

In the companion case, *Lyon,* the State also claimed ownership and asserted the tidelands trust applied to the shorezone of Clear Lake, another non-tidal, navigable lake.[14] That trial court likewise rejected the State's claims. The State's petition to the appellate court was denied.

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[14] *Lyon* was litigated in different trial and appellate courts than *Fogerty.*

The California Supreme Court granted the State's petitions for hearing in both *Lyon* and *Fogerty*. The cases were heard, considered and decided together.

On March 20, 1981, the California Supreme Court issued decisions in both cases confirming fee ownership in the upland owners but rejecting their constitutional arguments and imposing the tidelands trust servitude on the shorezone of "all . . . California . . . non-tidal, navigable lakes and rivers." (*Fogerty* at 247; App. A-8).

REASONS FOR GRANTING THE WRIT

A writ should be granted because:

(1) *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, has been erroneously held to impose a "public trust" servitude on the shorezone of all inland, navigable waters in California;

(2) Imposition of this servitude violates Petitioners' constitutional right to due process and takes private property for public use without just compensation; and

(3) The power of state courts to reallocate property rights between the "public" and individual owners under the "public trust" doctrine is a question of national importance requiring early resolution.

The *Fogerty* decision involved three issues:[15]

(1) The location of the landward boundary of the State's fee ownership of the bed of Lake Tahoe;

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[15]The California Supreme Court did not repeat the *Lyon* analysis of the fee ownership and servitude issues in *Fogerty* saying, "The primary issues are the same as those discussed in [Lyon], . . ." (*Fogerty* at 243; App. A-1.)

(2) The imposition of the servitude on the land between the high and the low water marks at Lake Tahoe; and

(3) The estoppel of the State to assert the servitude.

Of these three issues, this petition concerns only the imposition of the tidelands trust servitude.[16] Petitioners are not requesting this Court's review of the other issues.[17] Nor do Petitioners challenge the government's police power to regulate and protect Lake Tahoe[18] or the public's rights to navigable waters.[19]

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[16]*Fogerty* apparently imposes the servitude between the artificial high and low water marks at Lake Tahoe. (*Fogerty* at 247-249; App. A 8-11).

[17]*Lyon* held that the boundary of the State's fee ownership of the bed of inland navigable waters was the low water mark. *Fogerty* considered whether the artificial or natural low water marks determined this boundary.

Fogerty held the trial court erred in concluding ". . . that the 'last natural' low water mark of Lake Tahoe is the appropriate standard by which to measure the boundary between public and private ownership." (*Fogerty*, at 249; App. A-11). Since 1950 when the Commission completed its boundary line survey of the Lake Tahoe lakefront, the State has treated the artificial low water mark (6223 feet above mean sea level) as the boundary between public and private ownership. *Fogerty's* implicit holding, then, is that the artificial low water mark at 6223 feet is the boundary between State and private ownership. (See *Fogerty*, at 247-249; App. A 8-11). (6223 feet elevation is also the *natural high* water mark.)

The California Supreme Court erred in holding the State was not estopped to assert the servitude. (See *Fogerty* dissent at 250; App. A-12). The requested review does not require consideration of that question.

[18]The Lake Tahoe basin is probably the most heavily regulated and environmentally protected area in this country. (See, e.g., *Fogerty* at fn. 3, at 246; App. A-7).

[19]Petitioners have always recognized the public's navigational servitude or easement of passage over the privately owned lands between the low and high water marks when the waters over those lands are capable of being navigated by small craft. However, the

Illinois Central Does Not Impose A Public Trust Servitude Under Federal Common Law

The California Supreme Court relied on *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387, to hold that from California's statehood in 1850 a public trust servitude attached to Petitioners' shorezone between the high water mark and the low water mark. Petitioners submit that this issue is governed by state rather than federal law. The scope and application of the *Illinois Central* public trust doctrine is a question of national importance which should be resolved by this Court.

Illinois Central held that under Illinois law the Illinois legislature had exceeded its authority in granting the submerged lands in the bed of Lake Michigan to the railroad. The subsequent legislative repeal of the grant withstood the railroad's contention that it impaired the obligation of contract. The state's duty, which the Court ruled was violated by the original grant, arose from a "trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . ." The Court observed that the "trust . . . requires . . . the State to preserve such *waters* for the use of the public . . ." (*Illinois Central, supra,* at 452-453) (Emphasis added.)

The proper application of the *Illinois Central* public trust doctrine is the subject of litigation in several states

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easement does not extend to the *lands* when the waters recede. See, e.g., *People ex rel Baker v. Mack* (1971) 19 Cal.App.3d 1040, 1050; *Hitchings v. Del Rio Woods Recreation & Park District* (1976) 55 Cal.3d 560, 571; see also, Cal. Const., art. X, § 4 (Deering, Supp. 1981) (protection of navigation on state's waters) and Cal. Const., art. X, § 1 (Deering, Supp. 1981) (right of eminent domain to condemn access over the adjoining lands to navigable water.)

and of spirited scholarly debate nationally. *Lyon* held that under *Illinois Central* on statehood California took the beds of all navigable waters to the high water mark impressed with a public trust servitude which survived the legislative determination to only claim the beds of non-tidal navigable waters to the low water mark. In a case pending before the California Supreme Court the application of *Illinois Central* to lands acquired by Mexican grants prior to statehood is being litigated.[20] The State of Nevada now asserts that the public trust servitude applies to the shorezone of Lake Tahoe on the Nevada side.[21] In the past decade, numerous reported decisions of other states have considered the application of the *Illinois Central* public trust servitude.[22]

Noted scholars argue that the *Illinois Central* public trust doctrine should be expanded. For example, Professor Joseph Sax stated:

> Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource manage-

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[20]*City of Los Angeles v. Venice Peninsula Properties, State of California ex rel. State Lands Commission, Real Party in Interest* (1981) 117 Cal.App.3d 335. The appellate court rejected the State's argument that a public trust easement attached to lands which were part of a Mexican land grant prior to California's statehood. Appendix J sets forth excerpts of the appellate court decision and dissent. Respondents' petitions for hearing granted and cause transferred to California Supreme Court on May 21, 1981, by Bird, C.J., Tobriner, J., Mosk, J., Newman, J.

[21]*Incline Village General Improvement District v. State of Nevada*, Case No. 78-3191, Second Judicial District, County of Washoe, Appendix K.

[22]Appendix L lists cases citing *Illinois Central* since 1970.

ment problems. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471, 474 (1970).

Professor Sax described *Illinois Central* as "the lodestar of American public trust law" and "the most celebrated public trust case in American law." (*Id* at 489.) The attention this article has received is illustrated by the fact that it has been cited in 18 reported decisions and 124 law review articles since its publication in 1970.[23] (See also, Sax, *Liberating the Public Trust Doctrine From its Historical Shackles*, 14 U.C.D. L. Rev. 185 (1980).)

In a study commissioned by the President's Council on Environmental Quality in the chapter, "Sidestepping the Taking Issue," the authors observe:

> Professor Joseph Sax has discussed at length this concept of property 'as an interdependent network of competing uses' in articulating an expanded theory of the public trust inherent in property. [Sax, 'Takings, Private Property and Public Rights,' 81 *Yale L. J.* 149, 140 [sic] (1971)]. Obviously the possibility of claiming such paramount title interests is useful only in regard to particular types of property, but where available may be the easiest method of avoiding the taking issue.[24] (Footnote included.)

Petitioners submit that the *Illinois Central* public trust doctrine is not a federal common law rule and that Petitioners' title and rights to the shorezone of Lake Tahoe are determined solely by state law. *Barney v. Keokuk* (1876)

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[23]Appendix M and N list cases and law review articles citing the Sax article.

[24]"The Taking Issue," Executive Office of the President's Council on Environmental Quality, Washington, D.C., July 9, 1973, Ch. 16 at p. 313.

94 U.S. 324; *Hardin v. Jordan* (1891) 140 U.S. 371, 382; *Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363; *Wilson v. Omaha Indian Tribe* (1979) 442 U.S. 653. Where upland owners have valid title to land bordering navigable waters, the State is prohibited from imposing an extensive servitude on the property without due process of law and just compensation.[25]

The national confusion and debate surrounding the *Illinois Central* public trust doctrine cannot be settled by this Court's past treatment of *Illinois Central*. Since 1926, this Court has cited *Illinois Central* only twice, both times in dissent.[26] Moreover, this Court's past treatment of the case appears somewhat inconsistent.

This Court has frequently cited *Illinois Central* for the rule that state law governs the rights and title of riparian owners to the beds of navigable waters.[27] This is consistent with other cases holding that the states may determine for

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[25]See pp. 17, et seq., *infra*.

[26]*Bonelli Cattle Co. v. Arizona* (1973) 414 U.S. 313, 332 (Stewart, J. dissenting); *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 50 (Brennan, J. dissenting).

[27]In dissent to *Bonelli Cattle Co. v. Arizona* (1973) 414 U.S. 313, Justice Stewart criticized the majority's holding that federal common law governed a riparian owner's rights to lands abandoned by the Colorado River as a result of a federal rechanneling project. Justice Stewart stated: "'[T]he settled law of this country [is] that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable [rivers], within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof. . . .' *Shively v. Bowlby* (1894) 152 U.S. 1, 47; *Illinois Central R. Co. v. Illinois* (1892) 146 U.S. 387, 435; *United States v. Holt Bank* (1926) 270 U.S. 49, 54-55." (*Bonelli, supra*, at 332, fn. 1.) (See, *Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363.)

Appleby v. City of New York (1926) 271 U.S. 364, 380, 393-396 held: "[T]he construction and effect of the contract involved . . . depend chiefly upon the extent of the power of the State and city

themselves whether to assert any interest in the beds of inland navigable waters and, if so, whether the boundary of the state interest is the high or low water mark. For example, *Barney v. Keokuk* (1876) 94 U.S. 324, 338 held: "If [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."[28]

However, this Court has also cited *Illinois Central* as limiting the states' power to dispose of navigable *waters* in a manner inconsistent with the public's interest in such waters.[29] For example, *St. Anthony Falls Water Power Co.*

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to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the State, as it was when the deeds were executed . . ." (*Id* at 380.)

Illinois Central Railroad Co. v. Chicago (1900) 176 U.S. 646, 659-660, recognized that the power of the state to sell submerged lands was governed by state law. This Court stated: "It is true . . . that if either the language of the grant or long usage under it clearly indicates an intention that waters submerged by the sea shall be included, it is within the power of the sovereign to grant them." (*Id* at 660.)

See also *United States v. River Rouge Co.* (1926) 269 U.S. 411, 418-419; *Long Sault Dev. Co. v. Call* (1916) 242 U.S. 272; *Philadelphia Co. v. Stimson* (1912) 223 U.S. 605, 632; and *Mobile Transportation Co. v. Mobile* (1903) 187 U.S. 479, 487.

[28]See also *Hardin v. Jordan* (1891) 140 U.S. 371; *Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363.

[29]In dissent to *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 50, Justice Brennan, citing *Illinois Central* stated: "All private rights of property, even if acquired through contract with the State, are subordinated to reasonable exercises of the States' lawmaking powers in areas of . . . environmental protection . . ." This statement could be construed as a rule of constitutional law limiting the states' power to dispose of property interests.

In *Darling v. City of Newport News* (1919) 249 U.S. 540, 543-544, this Court cited *Illinois Central* in questioning the power of the

v. St. Paul Water Commissioners (1897) 68 U.S. 349, 372, considered a claim that Minnesota had granted away its right to ever use the waters of the Mississippi River for any public purpose. This Court observed that the validity

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states to legislatively restrict public use of tidewaters for sewage purposes.

Weems Steamboat Co. v. People's Co. (1909) 214 U.S. 345, 355 stated: "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated. These rights are subject to the paramount public right of navigation."

United States v. Chandler-Dunbar Co. (1908) 209 U.S. 447, 451-452 considered whether the state granted the bed of a navigable river to a private owner, stating: "[I]f such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387. . . . The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in *Shively v. Bowlby* 152 U.S. 1, 47 are that the State may use or dispose any portion of the same 'when that can be done without substantial impairment of the interest of the public in such waters . . .' But it cannot be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interest of the public in the waters of the Sault Ste. Marie. . . . The question then is narrowed to whether the bed of the strait is held to pass by the laws of Michigan. We are content to assume that the waters are public waters."

In *West Chicago Railroad v. Chicago* (1906) 201 U.S. 506, 524, this Court stated: "[T]he rights of the company, as the owner of the fee of land on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river."

Shively v. Bowlby (1894) 152 U.S. 1, 47, holds that state law controls ownership, dominion and sovereignty to navigable waters ". . . with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters . . ."

See also, *Scott v. Lattig* (1913) 227 U.S. 229, 242-243; *United States v. Mission Rock Co.* (1903) 189 U.S. 391, 404-407; and *Morris v. United States* (1899) 174 U.S. 196.

of such a legislative grant was doubtful under *Illinois Central*. Thus, this Court indicated that *Illinois Central* was not simply based on Illinois law, but rather established a federal common law rule limiting Minnesota's authority to dispose of its interest in navigable waters.

The scope and application of *Illinois Central* is a question of significant national controversy. One view is that *Illinois Central* establishes a federal common law rule on which to base "a comprehensive legal approach to resource management problems." Petitioners submit that *Illinois Central* does not establish a federal common law rule. Even assuming *Illinois Central* establishes a federal rule, it limits only the states' power to impair the public's rights in navigable *waters*, not the states' power to determine rights and title to *land* bordering navigable waters. This Court should determine the proper application of the *Illinois Central* public trust doctrine to clarify and stabilize the title and rights of all the owners nationally whose land borders navigable waters.

Imposition Of The California Tidelands Trust Servitude Deprives Petitioners Of Property Without Due Process Of Law And Takes Petitioners' Property For Public Use Without Just Compensation

The Fourteenth Amendment provides that no state shall deprive any person of property without due process of law. The Fifth Amendment provides that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation. The Just Compensation Clause applies to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R. Co. v. Chicago* (1897) 166 U.S. 226, 239, 241.

Constitutionally protected property interests are not created by the Constitution but by existing "rules or understandings" stemming from an independent source such as state law. *Board of Regents v. Roth* (1972) 408 U.S. 564, 577; *Paul v. Davis* (1976) 424 U.S. 693, 709-710. The states determine the title and rights of riparian proprietors in the beds of navigable waters. (*Barney v. Keokuk* (1876) 94 U.S. 324, 328; *Oregon v. Corvallis Sand & Gravel* (1977) 429 U.S. 363.) Once these rights are created they are entitled to constitutional protection. As this Court cautioned in *Mobile Transportation Co. v. Mobile* (1903) 187 U.S. 479, 487: "[I]f riparian proprietors have acquired the title to the property below high water mark by a grant or prior possession, good against the State, they could only be dispossessed by proceedings in eminent domain."

Petitioners have title to the land good against the State. (*Lyon* at 226; App. B-18). Imposition of the tidelands trust servitude[30] deprives them of property without due process

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[30] See footnote 3, *supra*.

From 1850 to 1971 the State servitude included only the public uses of commerce, navigation and fisheries. *People v. California Fish* (1913) 166 Cal. 576, at 584-585; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, at 482. *Marks v. Whitney* (1971) 6 Cal.3d 251, greatly expanded the public uses of the servitude: "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes . . . The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . There is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect

of law and without just compensation. In one sentence the *Lyon* court brushed aside the constitutional issue stating: "We doubt whether any failure of the state to previously assert its trust rights in the lands below high water . . . constitutes a 'rule of property.'" (*Lyon* at 231; App. B-27).

From 1850 to 1977 all three branches of California government repeatedly confirmed that the State's interest in the submerged beds of inland navigable waters extended only up to the low water mark.[31] For over a century the boundary of the state's interest and the rights of the property owners were settled.[32] The property owners reasonably

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the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands." *Marks, supra*, 259-260.

The *Lyon* court held, for the first time, that the trust was equally applicable to non-tidal waters adding to the uses set forth in *Marks* the following public recreational uses: "picknicking, hiking, bird-watching, and nature study." (*Fogerty* at 245; App. A-5).

[31]See footnotes 8, 9 and 10, *supra*.

[32]*Lyon* theorizes that on admission to the Union in 1850 California acquired title to the beds of navigable waters to the high water mark and retained this land until 1872 when the legislature adopted Civil Code § 830 granting the land between high and low water marks to the private owners. Petitioners dispute this contention. In Justice Paras view, which Petitioners share, in 1850 California adopted the common law which did not provide for sovereign ownership to the high water mark. (App. E). Civil Code §§ 670 and 830, enacted in 1872, declared that the State claimed only to the low water mark of inland navigable waters. *Wright v. Seymour* (1886) 69 Cal. 122, 127 held that these statutes declared the law of the State since statehood. Thus, *Lyon* disregards the 1850 common law, the 1872 statutes and *Wright* in ruling that California owned to the high water mark in 1850. The *Lyon* court adopted this holding to justify its conclusion that the State retained an implied servitude when it "granted" the land away in 1872, for the State could not reserve a servitude in land it never owned. Petitioners remain convinced that this holding is erroneous. However, the dispute is academic. The *Lyon* court holds that from 1872 to

expected the boundary of the state's interest to remain at the low water mark and reasonably expected to retain their rights to the exclusive use and possession of the land above the low water mark. These rules and understandings were relied on by the property owners in purchasing, investing, improving, maintaining and paying taxes on the property. Their reasonable investment-backed expectations are protected by the United States Constitution. (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104; *Kaiser Aetna v. United States* (1979) 444 U.S. 164).

The *Lyon* decision destroyed these expectations. As stated in dissent to *Lyon*:

> The majority opinion overwhelmingly establishes that by statute, case authority and practice California historically has not claimed title to land between the high and low water marks of inland bodies of water.
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> To apply [the tidelands trust] doctrine for the *first time today* casts clouds on thousands if not millions of land titles and uses . . . (*Lyon* dissent at 233; App. B-30). (Emphasis added)
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> • • •
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> Protection of parts of our historic shorezone for the purposes permitted by the trust is a worthy endeavor but it should not be accomplished with a blunderbuss that confiscates thousands—perhaps millions—of titles, and jeopardizes existing use of millions of acres of residential and farm lands. . . . From time immemorial landowners within the shorezone have conducted them-

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date the proprietors have held fee title to the land. From 1850 to 1977, the State never asserted a servitude in this land. Petitioners submit that the rules and understandings between the State and the proprietors from 1872 to 1977 are more than adequate to create constitutionally protected property interests.

selves in good faith as if they were owners in fee, and the land (apart from improvements) has been assessed and taxed as in the case of all fees not subject to the state's assertion of a right to take under a trust. To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible. (*Lyon* dissent at 238; App. B 37-38).

The *Lyon* majority imposed the servitude on the theory that the California legislature "granted" the property by Civil Code § 830 and retained a servitude between the high and low water marks by *implied reservation*.[33] Nothing in the statute, its legislative history, its judicial application, its implementation and administration by state agencies, or the conduct of the State or the owners supports this conclusion.[34]

The Court sought to justify the result here by reference to *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515; *People v. California Fish* (1913) 166 Cal. 576; and *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387. These cases do not support the Court's imposition of the servitude.

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[33]But see *Leo Sheep Co. v. United States* (1979) 440 U.S. 668.

[34]Nor does a factual analysis support the Court's conclusion. Creation of a servitude requires ownership at the time of the reservation. Between California's admission to the Union in 1850 and the enactment of California Civil Code § 830, the state did not own the property now claimed to be subject to the servitude. The Court concluded that the state took title in 1850 to the high water mark. The only high water mark in 1850 was the *natural* high water mark. The property at Lake Tahoe on which the Court imposes the servitude lies above and landward of the *natural* high water mark. (See fn. 17, *supra*.)

City of Berkeley, was described by the *Lyon* court as follows:

> In *City of Berkeley* we were concerned with whether 22,299 acres of tidelands in San Francisco Bay, granted to private persons by deeds purportedly in fee, between 1868 and 1887, were subject to the *tidelands trust*. We answered this question in the affirmative. We observed that under the venerable doctrine of the *tidelands trust*, which had its origin in Roman law, tidelands are owned by the state in trust for the public, for their use for commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state. Grants of such lands to private persons are subject to the trust unless the conveyances are made to enhance trust purposes. We determined that the grants in question were not made for such purposes, and that in any event, the state was not empowered to made such vast grants to private parties in its role as trustee. (*Lyon* at 226; B-19). (Emphasis added.)

Thus, in *City of Berkeley*, the Court recognized the tidelands trust since the legislative grant of fee title violated the State's duty as trustee of the tidelands. Two distinctions render *City of Berkeley* inapplicable here: First, the lands in question are not "tidelands" and therefore not within the tidelands trust under California law prior to *Lyon*.[35] Second, *Lyon* held that legislature acted properly in declaring that the upland owner had fee title to the land above the low water mark.[36]

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[35]See footnote 7, *supra*.

[36]*Lyon*, 225-226; App. B-18). The language the *Lyon* court uses to express these holdings illustrates the distinction. The *Lyon* court stated that in *City of Berkeley* "[w]e determined . . . the state was not empowered to make such vast grants to private parties." (*Lyon* at 226; App. B-19). Conversely, in considering the same question in *Lyon* the Court stated: "We do not doubt that the state had the power to make such grants." (*Lyon* at 222; App. B-13).

California Fish, supra, recognized a tidelands trust on tidelands which that court held were invalidly conveyed by the legislature. *California Fish,* is therefore also inapplicable here where *non*-tidelands were *validly* conveyed.

Illinois Central Railroad Co. v. Illinois (1892) 146 U.S. 387 is likewise inapplicable. First, the case was decided under Illinois law. Second, it did not involve land validly owned in fee title. Third, it involved the submerged bed of Lake Michigan, not the shorezone.[37] (See 11-17, *supra.*)

The California Supreme Court's reliance on these three cases is unjustified. The Court ignored the historical distinction between tidal and non-tidal waters[38] and disregarded Petitioners' valid fee title to the shorezone. Imposition of the state servitude on Petitioners' land thus raises radically different constitutional questions.

A state court cannot destroy property rights by unpredictably relying on inapplicable law. In *Hughes v. Washington* (1967) 389 U.S. 290 this Court reviewed a 1966 Washington decision holding for the first time that since the state's admission to the Union in 1889 it claimed ownership of the seashore accretions on a beach which had been

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[37]The *Lyon* dissent states: "[In *Illinois Central*] the Supreme Court held that a grant of *submerged* lands in Lake Michigan was subject to the trust . . . The court expressly recognized that it did not impose a trust on the shorezone." Justice Clark quotes from *Illinois Central* as follows: " 'If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practicable navigability the claim of the railroad company to their title and possession will be confirmed . . .' " (Dissent at 238; App. B-38, emphasis in original.) He concludes: "Far from serving as authority to extend the trust to freshwater shorezones, *Illinois Central Railway* reflects it is *only* navigable submerged lands that are subject to the trust." (Dissent at 239; App. B-39, emphasis in original.)

[38]See, e.g., Cal. Civ. Code §§ 670 and 830; Cal. Code of Civ. Proc. § 2077; and footnotes 8, 9 and 10 *supra.*

treated as private property for 80 years.[39] Justice Stewart's concurring opinion analyzed the constitutional issues raised by the state court decision:

> To the extent that the decision of the Supreme Court of Washington [on the issue of ownership of the accretions] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that [the Washington decision] constitutes a sudden change in state law, unpredictable in terms of relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for determination of this Court. (*Id.* 296-297.)[40]

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[39]*Hughes v. Washington* held that under federal common law the proprietor owned the accretions. The federal common law basis of this case is questionable since *Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363 held that state law controlled similar questions.

[40]This rule requires that state decisions regarding property rights rest on a "fair or substantial basis." *Broad River Co. v. South Carolina* (1930) 281 U.S. 537, 540 states: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded." *Fox River Paper Co. v. Railroad Comm.* (1927) 274 U.S. 651; *Muhlker v. New York and H. R. Co.* (1905) 197 U.S. 544.

As in *Hughes,* in the instant case since the State's admission to the Union both the State and the owners regarded the lands in question as private property. Imposition of the tidelands trust servitude for the first time in 1981 was unpredictable in terms of relevant legal (or factual) precedent. No authority supports imposing the tidelands trust servitude on non-tidal waters; no authority supports imposing a state servitude on land validly held in fee simple ownership.

Courts may not convert private property to public uses with constitutional impunity. For example, *Kaiser Aetna v. United States* (1979) 444 U.S. 164 held that a decision converting a private pond into a public aquatic park violated the owners' Fifth Amendment rights. Similarly, in *Hughes v. Washington,* Justice Stewart's concurring opinion analyzed the constitutionality of a state decision converting previously private beach property to public uses:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.* Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in revers-

ing the judgment. (*Id.* at 297-298, emphasis in original.[41]

[41]The State argued that once a litigant has a hearing the constitutional due process requirements are satisfied even where an erroneous state court decision converts private property to public uses. (Answer to Petition for Rehearing, at 10-12.) The State bases this argument in part on Chang, Unraveling *Robinson v. Ariyoshi:* Can Courts "Take" Property? 2 U. of Hawaii L.Rev. 57 (1979) where the author describes Justice Stewart's position in *Hughes v. Washington* as "the laymen's view of a taking." (Chang, at 64-67.) However, courts, like any arm of the State, are bound by the Constitution. *Shelley v. Kraemer* (1948) 334 U.S. 1, 17, explained that judicial action held to violate the Fourteenth Amendment was not limited to procedurally unfair proceedings. In support of this statement, this Court cited *Chicago, Burlington and Quincy R. Co. v. Chicago* (1897) 166 U.S. 226 holding: "If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment." (*Id* at 235.) *Shelley v. Kraemer* concluded: "[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the actions of the States to which the Amendment has reference includes action of state courts and state judicial officials . . . [I]t has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." (*Id* at 18.) The effect of state action determines whether constitutional rights have been violated, not the intent or form of state action. *Hughes v. Washington* (state court action); *Kaiser Aetna v. United States* (1979) 444 U.S. 164 (court action); *San Diego Gas & Electric v. City of San Diego* (1981) . . . U.S. . . , 101 S.Ct. 1287, 1304 (Brennan, J. dissenting) (zoning ordinance). Here the effect on the Petitioners and the benefits to the government are as if the State had condemned the land. However, where the court takes the property, without the benefit of a condemnation action, constitutional rights are violated. (In *Sotomura v. County of Hawaii* (1978) 460 F.Supp. 473 and *Robinson v. Ariyoshi* (1977) 441 F. Supp. 559, the Federal District Court held that the Hawaiian Supreme Court had taken property by radically changing existing

The court-imposed servitude not only deprives Petitioners of the right to exclude others and the right to beneficial use of the property, but also imposes affirmative burdens on Petitioners which should be borne by the public as a whole.

Lyon terminates Petitioners' "right to exclude others." *Kaiser Aetna* (1979) 444 U.S. 164, 179-180, held that the "right to exclude" is "universally held to be a fundamental element of the property right" which cannot be taken by the state without payment of just compensation.

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *U.S. v. Dickinson* (1947) 331 U.S. 745, 748; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 146 (Rehnquist, J. dissenting). Under the *Lyon* decision Petitioners' property will be impressed with an extensive state servitude encompassing the public uses of navigation, commerce, fishing, hunting, swimming, bathing, picnicking, hiking, birdwatching, nature study and preservation of the land in its natural state.[42]

Lyon attempts to minimize the effect the servitude will have:

> We emphasize that *Lyon* is not deprived of the use of the lands between low and high water, and that he

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state property law. Both cases are pending before the Ninth Circuit Court of Appeals.)

[42]Further, the scope of the servitude imposed by *Lyon* has been unconstitutionally expanded. From 1850-1971 the tidelands trust servitude included only the public uses of navigation, commerce and fisheries. (See footnote 30, *supra*.) While the government may increase the permissible public uses of a servitude, it must pay just compensation for doing so. See *Beckley v. Reclamation Board* (1962) 205 Cal.App.2d 734; *Shaeffer v. State of California* (1970) 3 Cal.App.3d 348, 351-352.

> may utilize them in any manner not incompatible with the public's interest in the property. (*Lyon* at 232; App. B-29). (Footnote omitted.)

In fact, the "inroads" on Petitioners' use of their property are much more extensive than traditional servitudes. For example, one use included in the servitude is preservation of the land in its natural state. Thus *any* use of the land by Petitioners would be prohibited as incompatible with the servitude. (Cf. *San Diego Gas & Electric Co. v. City of San Diego* (1981) .... U.S. ...., 101 S.Ct. 1287, 1301-1307 (Brennan, J., dissenting) and *Agins v. City of Tiburon* (1980) 447 U.S. 225, 260.)

The devastating economic impact of the State's acquisition of this servitude is unquestioned (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 533-536) and is a proper consideration in determining whether a taking has occurred. *Prune Yard Shopping Center v. Robins* (1980) 447 U.S. 74, 82-83; *Kaiser Aetna v. United States* (1979) 444 U.S. 164; *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124; *San Diego Gas & Electric Co. v. City of San Diego* (1981) ..... U.S. ....., 101 S.Ct. 1287, 1302 (Brennan, J. dissenting).

The taking determination "requires an examination of whether the restriction on private property 'forc[es] some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.' " (*Prune Yard Shopping Center v. Robins* (1980) 447 U.S. 74, 83). See *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 140 (Rehnquist, J. dissenting); *San Diego Gas & Electric Co. v. City of San Diego* (1981) .... U.S. ....., 101 S.Ct. 1287, 1306 (Brennan, J. dissenting).

Under *Lyon,* Petitioners, in effect, hold their property for the benefit of the "public". (*Fogerty* at 247; App. A-8).

For example, requiring public access to this land increases the costs of maintenance, liability insurance and security services.

The California Supreme Court relied on public policy grounds to justify the imposition of this servitude on Petitioners' property. (*Fogerty*, at 246-247; App. A 6-8). See *San Diego Gas & Electric, supra*, at 1308 (Brennan, J. dissenting.) But, as Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 416:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change.

Respectfully submitted,

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Appendix

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81-182

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Appendix A

State of California v. Superior Court (Fogerty)

In The Supreme Court of the State of California

S.F. No. 24035

THE STATE OF CALIFORNIA et al., Petitioners v. THE SUPERIOR COURT OF PLACER COUNTY, Respondent; CHARLES F. FOGERTY et al., Real Parties in Interest.

[Filed Mar. 20, 1981]

OPINION

MOSK, J.—The present action is concerned with the ownership of lands between high and low water in Lake Tahoe, a navigable lake in which there is no appreciable ebb and flow of the tide. The primary issues are the same as those discussed in *State of California v. Superior Court (Lyon), ante,* page 210 [..... Cal.Rptr. ....., ... P.2d .....], but some questions in addition to those in the *Lyon* action are raised by the parties.

In the spring of 1977, the State Lands Commission, after being advised by the Attorney General that the state claimed ownership of the property between high and low water in navigable nontidal lakes and rivers, proposed to record claims to such lands in the offices of county recorders throughout the state.

Thereupon, Charles and Stella Fogerty and other owners of property along the shore of Lake Tahoe, and Tahoe Shorezone Representation, a corporation which represents many shoreline owners, filed this action for declaratory relief and inverse condemnation, and claimed violation of

their civil rights (42 U.S.C. § 1983).[1] The complaint alleged that plaintiffs owned the lands between high and low water in the lake in fee simple, that many of them had built piers or docks extending to low water, and that the state wrongfully asserted title or a public trust to high water. Plaintiffs sought an injunction to prevent the state from claiming any interest in the property between high and low water. As defendants in the action, they joined the state, the State Lands Commission, and several state officials (hereinafter called the People).

After overruling the demurrers of the People and granting plaintiffs a preliminary injunction prohibiting the state from recording a notice that it owns the lands between high and low water in Lake Tahoe, the trial court granted plaintiffs' motion for partial summary judgment. It ruled that no portion of the property involved in this action landward of the last natural low water mark of Lake Tahoe is or ever was sovereign property of the state or subject to the common law public trust for commerce, navigation and fishing, and it denied the motions for partial summary judgment and for partial judgment on the pleadings filed by the People. Thereafter, the People filed this proceeding, seeking a peremptory writ of mandate to direct the trial

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[1]Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

court to vacate its order granting plaintiffs' motion, and to enter an order granting the motions made by the People.

The major issue raised by the plaintiffs, not discussed in *Lyon*, is that of estoppel. Strictly speaking, that issue is not formally before us. Plaintiffs' complaint pleads a cause of action for declaratory relief in estoppel, but their motion for partial summary judgment did not seek a ruling on this issue, and the trial court did not pass upon the question. The People, urging that plaintiffs should not be permitted to raise the issue, assert that estoppel is a question of fact for the trial court in any future proceeding. This argument is technically tenable. But if estoppel were to be determined on a case-by-case basis it would require a massive expenditure of time and money by the state, riparian landowners, and the judiciary. Such an effort may be avoided if, as we shall conclude, we can decide the question as a matter of law on the basis of the present record. (Cf. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 487-488 [91 Cal.Rptr. 23, 476 P.2d 423].)

The elements of equitable estoppel were described so thoroughly by Justice Sullivan in *Mansell* that little more need be said on the subject.[2]

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[2]There are four elements necessary to apply the doctrine: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (3 Cal. 3d at p. 489.)

We note that the opinion of the Attorney General referred to in *Lyon* declares that the public trust applies to the land in question (43 Ops.Cal.Atty.Gen. 288, 294 (1964)), and that it has long been

Since we find that one critical requirement for the application of the doctrine is absent, we need not discuss other aspects of the doctrine or their relevance to the present case. Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public (*Mansell,* 3 Cal.3d at p. 493), and we entertain no doubt that this would be the result if we were to hold that the People are barred from asserting the public trust in the lands at issue.

As we point out in *Lyon*, our decision will affect the rights of the public in 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water (the shorezone). Amicus curiae in the *Lyon* action, the California Department of Water Resources, points out that the shorezone has been reduced to a fraction of its original size in this state by the pressures of development. Such lands now cover less than one half of 1 percent of the state; a further reduction by 15 percent was projected for 1980. Some authorities have warned that at the present rate of destruction nearly all riparian vegetation on the Sacramento River could be eliminated in the next 20 years.

The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead and

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settled in this state that the fact a private landowner has title to tidewaters does not establish such ownership is free of the interest of the public. (See, e.g., *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79].)

striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.

The close relationship of the life forms in the shorezone to one another and to the condition of the bed of the stream or lake, the delicate balance among them, and the adverse effects of reclamation and development of these areas have been documented in numerous studies and reports. (E.g., U. S. Dept. of Agr., Forest Service (1973) Gen. Plan for Management of Nat. Forest Lands, Lake Tahoe Basin, Review Draft, Lake Tahoe Management Unit, South Lake Tahoe, pp. 1-2; Cal. Dept. Fish and Game (1974) Fish and Wildlife Res. of Anderson Marsh, Clear Lake, Lake County; Cal. Dept. Fish and Game (1966) 1 Fish and Wildlife Plan, p. 14.) One commentator has observed: "[T]he argument is now commonplace that these environments are the earth's most biologically productive . . . If nature bats last, wetlands may be the natural team's designated h[illegible]er." (*Nash, Who Loves a Swamp?* in Strategies for Protection and Management of Floodplain Wetlands, etc., a Symposium (USDA Forest Service, GTR-WO-12, Dec. 11-13, 1978.)) The recreational use of these areas for picknicking, hunting, fishing, hiking, birdwatching and nature study does not require elaboration to any Californian. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], Justice McComb made the following comment for a unanimous court regard-

ing the public uses of tidelands: "There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is a preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." That observation is equally applicable to the shorezone.

The Legislature has recognized the value of the shorezone by enacting statutes calling for its protection. (Pub. Resources Code, §§ 5093.50, 5811.) Section 5811 provides that "the remaining wetlands of this state are of increasingly critical economic, aesthetic, and scientific value to the people of California, and . . . there is need for an affirmative and sustained public policy and program directed at their preservation, restoration, and enhancement, in order that such wetlands shall continue in perpetuity to meet the needs of the people."

We are not convinced by the assertion that these considerations do not rise to the level of a strong public policy in favor of retaining the public trust in the shorezone. Plaintiffs argue that a large percentage of the shoreline of Lake Tahoe is presently devoted to public use either because of public ownership or the public utilization of privately owned shoreline facilities such as marinas, that the problems at Lake Tahoe are related to a large influx of people which contributes to the pollution of the lake, that the public beach areas are overused and the

forest cover destroyed by motor vehicles, and that the best preserved areas of the lake are in private ownership. Thus, they urge, the public interest in preservation of the scenic beauty of the lake would be enhanced by private rather than public ownership of the shorezone. Moreover, it is argued, owners are limited in their use of the shorezone by many regulations designed to protect the ecology of the area,[3] and these are adequate to protect the public's interest.

Amicus curiae, the California Land Title Association, in a brief filed in the *Lyon* action, asserts that the People exaggerate the ecological importance of the shorezone since not all shorezone areas are of ecological importance, some of the most significant being located above high water or below low water. It is also argued that the imposition of a trust on behalf of the public will not necessarily provide the ecological benefits which the People envision. That goal can be better accomplished on a project-by-project basis in which ecological concerns can be dealt with and private improvements prohibited, lim-

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[3]For example, state law requires mitigation of adverse environmental effects of a project (Pub. Resources Code, § 21000 et seq.), development which will obstruct the flow of a river or lake or which uses material from a stream bed must be approved by the Department of Fish and Game to determine whether it will adversely affect fish and wildlife (Fish & G. Code, § 1603); the California Tahoe Regional Planning Agency has broad powers to enact ordinances for the regulation of improvement at the lake (Gov. Code, § 67100), and 10 percent of the wetlands in the state are protected by a law providing for the formulation of a plan to control development of Suisun Marsh (Pub. Resources Code, § 29000 et seq.).

ited, or modified, depending on the ecological needs of the area involved.

Whether or not the shorezone of Lake Tahoe would be better preserved if privately owned than if the public has an interest therein is not determinative, since we are not concerned here with recreation only, nor with Lake Tahoe alone, but with a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California, in many of which the conditions may well differ in some respect from those at Lake Tahoe. Preservation of the public trust in the shorezone will allow the state flexibility in determining the appropriate use of such land, so that, for example, areas which are endangered by overuse can be closed to certain activities such as public bathing. A number of the considerations advanced by plaintiffs and amicus would call also for abdication of the tidelands trust and the substitution of regulation of tidelands development for the concept of the public's right to control such lands as a matter of right. These arguments appear to oppose the established public trust doctrine in principle, rather than its application to the shorezone as such.

The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands.

One question remains: whether the boundary between public and private ownership should be determined with reference to Lake Tahoe in its current condition, or the

"natural" level of the lake as it existed prior to the construction of a dam in 1870, which had the effect of raising the level of the lake. (See 30 Ops.Cal.Atty.Gen. 262, 267-268 (1957).) The trial court concluded that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" low water mark of the lake. Plaintiffs argue in favor of the trial court's ruling, while the People assert that the boundary should be fixed by assessing the lake in its current condition.

There is no direct authority on this issue in California. While there is authority relating to a landowner's right to accretions and relictions[4] and to the maintenance of a body of water at its existing level,[5] the issue in the present case revolves around rights in land between the natural water level of a lake and its current shoreline as raised by a dam constructed many decades ago. The People point

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[4]Section 1014 of the Civil Code provides that where land forms by imperceptible degrees from natural causes upon a river or stream by accumulation of material or the recession of the stream, it belongs to the owner of the bank. In *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 794 [147 P.2d 964], the court refused to apply this statute to tidelands, deciding that artificial accretions to tidelands belong to the state, because to hold otherwise would indirectly convey public tidelands into private ownership.

[5]Some cases hold that a landowner has a vested interest in a long-continued diversion of water by the state if he has made substantial expenditures in reliance upon the diversion (*Natural Soda Prod. Co. v. City of L. A.* (1943) 23 Cal.2d 193, 197 [143 P.2d 12]; *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 18 [25 P.2d 435]), and that he may recover damages if the level of a lake is lowered (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460, 472 [52 P.2d 585]).

out that it would be difficult (and probably impossible in some cases) to reconstruct the natural water level of a lake. There are hundreds of dams in California, some dating back to the early days of statehood. (Dept. of Wat. Resources, Dams Within Jurisdiction of State of Cal. (1976) Bull. No. 17-76.) The monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership in accordance with the water level which existed prior to the construction of these dams provides a convincing justification for accepting the current level of the lake as the appropriate standard.

Moreover, the dam at Lake Tahoe has been in existence since 1870, long past the period required for the acquisition of prescriptive rights by the state in the lands in question. (Civ. Code, § 1007; Code Civ. Proc., § 325.) It has been held in other jurisdictions that a landowner loses ownership of property covered by water resulting from the construction of a dam if the condition has continued for the period required for the acquisition of prescriptive rights. (*State v. Parker* (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; *State v. Sorenson* (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) *Sorenson* stated that in these circumstances "the artificial condition is . . . stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition." (Cf. *Chowchilla Farms Inc. v. Martin*,

supra, 219 Cal. 1, 18; *Natural Soda Prod. Co. v. City of L. A., supra*, 23 Cal.2d 193, 197.)

We hold that, under all the circumstances, the trial court erred in its conclusion that the "last natural" low water mark of Lake Tahoe is the appropriate standard by which to measure the boundary between public and private ownership.

We emphasize, as we did in *Lyon*, that these plaintiffs may use the shorezone for any purposes which are not incompatible with the public trust. Landowners who have previously constructed docks, piers and other structures in the shorezone may continue to use these facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone. (Pub. Resources Code, § 6312; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 455 [36 L.Ed. 1018, 1043, 13 S.Ct. 110]; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534 [162 Cal.Rptr. 327, 606 P.2d 362].)

Let a writ of mandate issue directing the trial court to vacate its order granting plaintiffs partial summary judgment, and to grant the People's motion for partial summary judgment and partial judgment on the pleadings, insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

CLARK, J., Dissenting.—For the reasons stated in my concurring and dissenting opinion in *State of California v. Superior Court* (*Lyon*), *ante*, page 210, [..... Cal.Rptr. ....., ...,

..... P.2d .....], the public trust declared today by the majority applies only to tide and submerged lands and does not apply to the shorezone. While the shorezone at Lake Tahoe may be a ring around the lake only a few feet in width, shorezones on navigable streams encompass hundreds of square miles which are presently in productive use for other than trust purposes, and we should not at this late date declare such uses unlawful.

I must also dissent from the majority's conclusion that the People may not be estopped from asserting the trust. The holding of the sole authority relied on by the majority, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423], is directly contrary to today's decision.

In *Mansell,* the City of Long Beach had claimed portions of a residential subdivision were tidelands subject to the trust. Estoppel was urged on the ground: "[T]he subject lands were filled and improved with the knowledge and acquiescence of the state and city and . . . since annexation of the area in 1923 the city has exercised full municipal jurisdiction over it—granting building permits, approving subdivision maps, constructing and maintaining streets and city services, collecting taxes." (*Id.,* at p. 487.)

This court first discussed estoppel as applicable to private parties in land title cases, concluding that the circumstances would be sufficient to estop private claims. The court continued: "It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. (*United States Fid. & Guar. Co. v. State Board of Equalization* (1956) 47 Cal.2d

384, 388-389 [303 P.2d 1034] and cases there collected.)' (*Driscoll v. City of Los Angeles, supra,* 67 Cal.2d 297, 306 [61 Cal.Rptr. 661, 431 P.2d 245].) (See generally 28 Am.Jur.2d, Estoppel and Waiver, §§ 122-133, pp. 782-802; 31 C.J.S., Estoppel, §§ 138-147, pp. 675-733.) Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .' (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747], see also cases there cited.) The tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (*Id.*, at p. 493.)

After lengthy discussion of the leading cases on the issue of estoppel against government, *Mansell* distilled the controlling rule: "After a thorough review of the many California decisions in this area, as well as a consideration of various out-of-state decisions, we have concluded that the proper rule governing equitable estoppel against the government is the following: The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.*, at pp. 496-497.)

The court concluded that the great injustice to homeowners which would result from failure to uphold an

equitable estoppel against the state and city justifies the minimal effect upon public policy resulting from raising an estoppel. (*Id.*, at p. 501.)

The majority in the instant case rely upon the language quoted above that "an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .' " The majority conclude that establishing trust rights to the shorezone is so important that the People may not be estopped as to thousands of linear miles of shorezone. (*Ante*, pp. .....)

The majority decision is arbitrarily contrary to *Mansell*. That case established that in appropriate circumstances the People could be estopped to assert the trust, when the resulting injustice would outweigh the public policy. There are no doubt, thousands of homeowners in cities of the Sacramento and San Joaquin Valleys, as well as other areas of the shorezone, in substantially the same position as were the homeowners in Long Beach. These homeowners, and thousands of farmers will suffer thousands of "great injustices," clearly outweighing the public trust loss in respect to individual lands. (3 Cal.3d at p. 501.)

While it would be a tremendous burden on the judicial system to determine in individual cases whether imposition of the trust involves "great injustice" outweighing trust detriment, the courts' business is the administration of justice. However burdensome the alleviation of "great injustice" may be, courts should not shirk their duty.

I would deny mandate.

Richardson, J., concurred.

Appendix B

State of California v. Superior Court (Lyon)

In The Supreme Court of the State of California

[S.F. No. 23981, Mar. 20, 1981.]

THE STATE OF CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF LAKE COUNTY, Respondent; RAYMOND R. LYON et al., Real Parties in Interest.

OPINION

MOSK, J.—In *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], we reaffirmed the ancient doctrine that tidelands—lands between the lines of mean high tide and mean low tide—are owned by the public, that the state holds these lands in trust for the people for their use for commerce, navigation, fishing and other purposes, and that this trust interest is retained even if the title to tidelands has been conveyed to private persons, unless the conveyance has been made to promote the purposes of the trust.

The present case also concerns lands along the shoreline, but the issue here is the boundary between state and private ownership in non-tidal, navigable lakes and streams between high and low water, i.e., lands alternately covered and uncovered by water as the level of the lake rises and falls with the seasons. The Attorney General, representing the People, claims that these lands are owned by the state, which acquired title thereto by virtue of its sovereignty upon admission to the Union, that they have not been conveyed to the owners of the lands along the shoreline, and that even if such conveyances have been made, the

lands in dispute are subject to the trust described in *City of Berkeley*.

Raymond R. Lyon and Margaret L. Lyon, real parties in interest (hereafter called Lyon) own 800 acres along the shore of Clear Lake in Lake County, a navigable body of water with an area of about 64 square miles. The portion of the property involved in the present dispute consists of more than 500 acres of marshland at the southern end of the lake, known as the Anderson Marsh, most of which is covered by water at certain times of the year. Lyon's predecessors in interest purchased the property from the state under patents issued between 1850 and 1906. These grants did not specify the waterward boundary of the land conveyed. Lyon sought to develop the property and applied for a permit to repair a levee for the purpose of reclaiming a portion of the marsh. The Fish and Game Commission notified him that it could not process his application for a permit because the State of California claimed ownership of the portion of the marsh which extends below the high water mark.

Lyon filed an action against the state and various of its agencies,[1] seeking to quiet title to the marsh, and for declaratory relief. He relied, inter alia, upon section 830 of the Civil Code.[2] The section, which was adopted in 1872, provides "Except where the grant under which the land is held indicates a different intent, the owner of the

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[1]Lyon joined the Department of Fish and Game and the State Lands Commission in the action. The commission has jurisdiction over the beds of navigable waters owned by the state or in which the state has an interest. (Pub. Resources Code, § 6301.)

[2]All references are to the Civil Code unless otherwise noted.

upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The People filed a cross-complaint to quiet title in the state to the portion of the Anderson Marsh between high and low water and for declaratory relief. The County of Lake intervened in the action in its capacity as grantee in trust of the state's interest in the lands underlying the lake. (Stats. 1973, ch. 639, § 1, p. 1165.) The county supported Lyon's claim that he owns the property to the line of low water.

Lyon, the county, and the People, all moved for partial summary judgment based on their respective claims. The trial court ruled in favor of Lyon and the county (hereafter sometimes collectively referred to as Lyon); it determined that no portion of the Anderson Marsh lying landward of the ordinary low water mark of Clear Lake is sovereign property of the state or subject to a common law public trust, but that the waters of the lake are impressed with a public servitude so that when the water rises above the low water mark, the public has the right to navigate between that line and the ordinary high water mark. The People seek a writ of mandate to compel the trial court to vacate its order, and to grant the People's motion for partial summary judgment.

The case involves issues which are of vast importance to the general public as well as to the owners of land bordering

upon navigable lakes and streams. The significance of these issues has generated extensive briefs by amici curiae,[3] and their analyses and arguments have been of considerable assistance to the court. No less than 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers in the state are involved. Substantial areas of land will be affected by our decision; at Clear Lake alone, there is a difference of 5,000 acres in the surface area of the lake between high and low water, and the Anderson Marsh constitutes one-half of the remaining fresh water marsh at Clear Lake. Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state.

Lyon's claim to the fee ownership of Anderson Marsh to the low water line is based on the following reasoning: California never acquired title to the beds underlying navigable nontidal waters above low tide. The United States Supreme Court has made it plain that the ownership of such lands is a matter of state rather than federal law. (*Hardin v. Jordan* (1891) 140 U.S. 371, 382 [35 L.Ed. 428, 433, 11 S.Ct. 808]; *Barney v. Keokuk* (1876) 94 U.S. 324, 338 [24 L.Ed. 224, 228].) The states exercised their options with regard to ownership of such land by adopting

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[3]The Department of Water Resources has filed an amicus brief in support of the People, as have the Sierra Club and the Natural Resources Defense Council (joint brief) and the Audubon Society and Friends of the Earth (joint brief). The California Land Title Association and the California Association of Realtors (hereafter referred to as California Land Title Association) have filed a joint brief on behalf of Lyon, and the Upper San Joaquin River Association also supports Lyon's position.

different rules; some states claim only to low water, some to high water, and others make no sovereign claim to the beds of nontidal bodies. Indeed, only a minority of states claim sovereign ownership to high water.[4] When California entered the Union, it determined to exercise no sovereign claim to the beds of nontidal navigable waters. This choice was made when, upon admission to statehood, the Legislature adopted a statute which provided that unless inconsistent with applicable federal or state law, the "Common Law of England shall be the rule of decision in all Courts of this State." (Stats. 1850, ch. 95, p. 219.) Under English common law, the sovereign made no claim to ownership of lands underlying nontidal waters. Therefore, by the adoption of the English common law, California made no claim to ownership of the beds of such waters. Subsequently, by the enactment of section 830 in 1872, the state determined to claim title only to low water.

The People contend, on the other hand, that California acquired title to the lands in question to the high water mark in its sovereign capacity upon statehood, citing, inter alia, *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370-371 [50 L.Ed.2d 550, 558-559, 97 S.Ct. 582]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338. Moreover, argue the People, section 830 did not grant such lands to private persons because that provision only sets forth a rule for the construction of deeds and does not constitute a grant of sovereign land.

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[4]Approximately 20 states adopt a low water line for navigable lakes and rivers, a few allow private ownership to the middle of the water, and other jurisdictions have adopted different rules for lakes and rivers. Ten jurisdictions have adopted the high water rule. (See fn. 9 at p. . ., *post.*)

We consider, first, whether California acquired sovereign ownership in the lands between low and high water in nontidal, navigable lakes and rivers upon admission to the Union. If this question is answered in the negative, the People's claim to fee ownership of these lands cannot prevail. If, on the other hand, the state owned the property in question at the time of admission to the Union, it will be necessary to decide whether, by the enactment of section 830 in 1872, it granted an interest therein to riparian landowners and, if so, the extent of the interest conveyed.

We begin with the proposition that, even accepting Lyon's assertion that the state did not automatically succeed to title to the beds of navigable nontidal lakes and streams to high water upon statehood but only had the option to make such a claim, absent an indication that the new state declined to exercise sovereign ownership of such lands, we would be compelled to decide the issue in favor of the state's title. The only basis for a claim that California abdicated its rights to claim to high water in 1850 was the adoption of the common law of England as the rule of decision in this state.[5]

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[5]The disagreement between the parties in this regard appears to focus not upon the question whether the state had the power to grant these lands to private persons, but upon when such power was exercised, i.e., when California entered the Union or thereafter. The People urge that the state succeeded to the ownership of the lands in question to high water as an inherent aspect of sovereignty, although sovereignty implies that after admission to the Union the state had the power to grant them to private persons. Lyon argues, on the other hand, that California never owned these lands but only had the option to claim ownership, and when it was admitted to the Union, by the adoption of the common law in 1850 and section 830 in 1872, the state elected not to exercise its right to claim ownership of the land between low and high water.

In England, there were different rules concerning the ownership by private persons of the beds of tidal waters and nontidal waters. Nontidal rivers and lakes were privately owned; a riparian holder took to the middle of the lake or the thread of the stream, much like the landowner along a public street. At the same time, the beds of all navigable waters were said to belong to the crown, and the King held such property in trust for the public and could not dispose of it free of that trust. Only waters where the tide ebbed and flowed were considered to be navigable in England. The reason for the difference in these rules is readily explainable: in England there were no navigable streams of any importance beyond the ebb and flow of the tide. Therefore, the terms "navigable" and "tidal" became synonymous; tidal (navigable) waters came to mean public waters, while nontidal (and in England nonnavigable) waters came to mean private waters. (*The Propeller Genesee Chief et al. v. Fitzhugh et al.* (1851) 53 U.S. (12 How.) 443, 454-458 [13 L.Ed. 1058, 1063-1065]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338.)[6]

Some of the original 13 states adopted the common law rule early in their history, for the same reason that the rule was appropriate in England, i.e., most of their waters were tidewaters, and until the use of steamboats "there could be nothing like foreign commerce upon waters with

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[6]The People contend that although the common law rule has generally been assumed to be as described above, there is some authority for the proposition that the tidal character of a body of water was not a critical factor in England in the determination of navigability. Numerous cases in addition to those referred to above support our characterization of the English rule. We need not discuss the authorities upon which the People rely, since we shall conclude that the common law test was not adopted in California.

an unchanging current resisting the upward passage." (*The Propeller Genesee Chief*, 53 U.S. at p. 455 [13 L.Ed. at p. 1063].) However, the English rule was obviously inappropriate as the nation expanded westward, where there were great rivers and lakes which were navigable in fact, even though they were not subject to the ebb and flow of the tide. These distinctions, and the inapplicability of the common law rules to conditions in much of the United States were recognized as early as 1851 by the United States Supreme Court. In *The Propeller Genesee Chief* it was held that the federal government had admiralty jurisdiction in rivers and lakes which were navigable in fact, whether or not the tide ebbed and flowed therein. In 1856, the courts of this state recognized that the tidal character of a body of water was not a proper test of navigability. (*American Water Co. v. Amsden* (1856) 6 Cal. 443, 446.)

The question of public ownership of navigable rivers and lakes was discussed in *McManus v. Carmichael* (1856) 3 Iowa 1. That case, which involved the boundary of public ownership along the Mississippi River, contains an exhaustive analysis of the common law rule of England and its application by early American courts. The court held that only those parts of the common law which were suitable to the conditions in Iowa were adopted by the new state. The opinion asks, rhetorically and somewhat floridly, "whether the rules and tests which are applicable enough to the rivulets of England, shall be taken to measure those waters whose flow is through the climates and zones of the earth?" (*Id.* at p. 31.) Needless to say, it held that the state owned the beds of navigable, nontidal bodies to

high water, and that the common law rule was inappropriate to the United States because the great nontidal rivers and lakes in this country are navigable in fact. Other states recognized the inapplicability of the English rule to conditions in this country prior to 1850. (E.g., *Carson v. Blazer* (Pa. 1810) 2 Binn. 475, 484-486; *Cates v. Wadlington* (S.C. 1822) 1 McCord 580, 582.)

In *Barney v. Keokuk, supra,* 94 U.S. 324, the high court considered the rule declared in *McManus,* and left no doubt the correct doctrine was laid down by that case, i.e., that the states own the beds of navigable, nontidal bodies to high water, and that the common law is inapplicable to conditions in the United States. Nevertheless, it held that states which had adopted the common law rule had the power to determine whether "as rules of property" it would be safe to change their adherence to the common law. After reaching these conclusions, the court made a statement upon which Lyon places great reliance: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Id.* at p. 338 [24 L.Ed. at p. 228].) Later cases repeated the proposition that the states are free to determine the ownership of lands below high water mark in navigable, nontidal lakes and streams. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433]; *Shively v. Bowlby* (1894) 152 U.S. 1, 40 [38 L.Ed. 331, 346, 14 S.Ct. 548].)

With this background, we consider whether we are compelled to conclude, as Lyon asserts, that by the adoption of the English common law in 1850, California accepted

the rule of private ownership of nontidal navigable waters so that title to their beds was never in the state but was granted directly to private riparian owners. We do not so conclude.

First, our courts have never adhered slavishly to common law doctrines if they were unsuitable to the circumstances of our people or if the conditions were those never contemplated by the common law. (*Van Ness v. Pacard* (1829) 27 U.S. (2 Pet.) 137, 143-144 [7 L.Ed. 374, 376-377]; *Jones v. California Development* (1916) 173 Cal. 565, 573-574 [160 P. 823].) *Crandall v. Woods* (1857) 8 Cal. 136, 142-143, referred to the English test of navigability as a rule "framed with special reference to the physical condition of a country differing widely from our own." The law is replete with situations in which this and other jurisdictions which adopted the common law have refused to follow those aspects which were unsuitable to local conditions. (See Traynor, *Statutes Revolving in Common-Law Orbits* (1968) 43 State Bar J. 509, 518 et seq.; Hall, *The Common Law* (1951) 4 Vand.L.Rev. 791, 805 et seq.) If we were to hold, as Lyon urges, that the adoption of the common law in 1850 signified the acceptance in this state of the English rule regarding the ownership of the lands in question, we would "apply a rule founded on a particular reason, to a case where that reason utterly fails." (*Crandall* at p. 143.)[7]

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[7]Lyon appears to argue that because *The Propeller Genesee Chief* was not decided until 1851, the year after California entered the Union, and *Barney* was not decided until four years after section 830 was enacted into law, the holdings of these cases may not be considered in deciding whether California, by adopting com-

Rejection of the common law rule is also supported by the enactment of section 830 in 1872. As we have seen, under English common law, a riparian landholder owned land beneath nontidal waters to the middle of the lake or the thread of the stream; the King had no ownership interest in such lands. Under the terms of section 830, according to Lyon, the boundary between public and private ownership was set at the low water line. If we were to accept Lyon's assertion, we would be led to the entirely irrational conclusion that, although California, by the adoption of the common law in 1850, granted fee title to lands beneath navigable nontidal waters to the center line, 22 years later it deprived riparian owners of their property to the center by the enactment of section 830, and decreed that henceforth they owned only to the low water mark.[8]

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mon law rules, intended to relinquish the state's right to claim ownership of the beds of navigable, nontidal waters. We cannot agree. These cases and many others (including some cases cited above decided before 1850) demonstrate that the common law rule regarding nontidal waters is inappropriate to conditions in this state. The concept that only common law doctrine applicable to local conditions has been incorporated into our law is as old as the state itself.

[8]*Wright v. Seymour* (1886) 69 Cal. 122, 127 [10 P. 323], is relied upon by Lyon for the proposition that section 830 merely codified the common law. It is true that the decision states the section is a "declaration of the law . . . as it has existed since the formation of our state government." However, this statement was made with reference to the portion of section 830 relating to tidal waters.

Lyon does not directly discuss the inconsistency between his assertions regarding the common law and the effect of section 830. He claims that the state "may have followed the English common law prior to 1872, and made no claims to the beds of non-tidal navigable waters," and that section 830 "finally resolved any uncertainty about prior common law rules in California." The problem with this approach is that it skirts the critical issue whether the state or

Finally, we observe that the jurisdictions which hold the high water line to be the boundary between private and public ownership have also adopted the common law as the rule of decision.[9] These cases demonstrate that there is an inconsistency between not accepting the English rule regarding the ownership of the beds of nontidal, navigable lakes and rivers and the adoption of the common law as the rule of decision.

The conclusion follows that California succeeded to the ownership of the beds of such waters upon its admission to the Union, to the high water mark.

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private persons owned the beds of navigable, nontidal bodies to high water between 1850 and 1872. If California followed the English common law, then private persons owned these lands to the center line and were deprived of their property between that line and low water by the enactment of section 830. If, as we conclude above, the common law rule was not adopted in this respect, then the lands were owned by the state to high water, at least until 1872. Amicus curiae California Land Title Association, recognizing this anomaly, asserts that enactment of section 830 amounted to an unconstitutional taking of lands of riparian owners between the center line and low water mark.

[9]Alaska (*State, Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984, 988); Arizona (*State v. Bonelli Cattle Company* (1971) 107 Ariz. 465 [489 P.2d 699, 701-702], revd. on other grounds (1973) 414 U.S. 313 [38 L.Ed.2d 526, 94 S.Ct. 517], overruled in *Corvallis Sand & Gravel Co., supra*, 429 U.S. 363, 382 [50 L.Ed.2d 550, 565]); Arkansas (*Anderson v. Reames* (1942) 204 Ark. 216 [161 S.W.2d 957, 959]); Florida (*Martin v. Busch* (1927) 93 Fla. 535 [112 So. 274-283]); Idaho (*Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265, 266]); Kansas (*Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031, 1033]); Oklahoma (*State v. Nolegs* (1914) 40 Okla. 479 [139 P. 943, 946]); Oregon (*Brusco Towboat Co. v. State, By and Through Straub* (1977) 30 Ore.App. 509 [567 P.2d 1037, 1040, 1042]); Utah (*Provo City v. Jacobson* (1947) 111 Utah 68 [181 P.2d 213, 214]; Washington (*State v. Superior Court* (1912) 70 Wash. 442 [126 P. 945, 947]).

We next consider whether the Legislature granted the lands in question to private persons by the enactment of section 830 in 1872. We do not doubt that the state had the power to make such grants. (See, e.g., *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 375 [50 L.Ed.2d 550, 561]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338; *Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433].) The question is whether section 830 was intended to accomplish this result.

As we have seen, the section provides that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the upland, . . . when it borders upon a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at low water mark. . . ."[10] Section 830 was a part of the Field Code, and when it was enacted in 1872, the Legislature added section 670 as well as section 2077 of the Code of Civil Procedure. Section 670 provides that the state is the owner of "all land below the water of a navigable lake or stream. . . ." Section 2077 sets forth rules for construing conveyances in situations where the construction is doubt-

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[10]As originally enacted, the section did not contain the introductory clause. It read, "When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." The statute was amended in 1874 to its present form. (Stats. 1873-1874, Amend. to the Codes, ch. 612, p. 220.) The People rely upon this change as indicating that the section was intended to set forth only a rule of construction.

ful. It provides that a deed to land bordering a navigable nontidal lake is to be construed as conveying the right of the grantor to low water mark.

The People urge that section 670 is a rule of property, and sections 830 and 2077 are rules of construction. They point out that section 830 contains no words of conveyance, such as "grant" or "quitclaim," and argue that to construe the section as a grant of thousands of linear miles of lands owned by the public would violate the rule that grants by the public to a private party are to be construed in favor of the public. (§ 1069; *People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703 [214 P.2d 378]; *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 174-175 [50 P. 277].) Lyon claims, on the other hand, that section 830 constitutes a rule of property, and that by enactment of the section, the state granted to riparian owners the lands to low water.

The parties cite numerous cases in support of their respective positions as to the interpretation of the section. We have examined these cases, and we find that while they contain dicta, suggestions, and implications from which one side or the other may take comfort, none contains a direct holding on the question whether section 830 was intended to constitute a grant of property between high and low water in navigable lakes and rivers.

Lyon relies upon *Packer v. Bird* (1886) 71 Cal. 134 [11 P. 873]. In that case, the plaintiff claimed ownership of an island in a navigable portion of the Sacramento River, asserting that his patent extended to the thread of the stream, which included the island. The court held that his

title went only to the "edge of the stream" and did not include the island. The quoted words are obviously ambiguous, but Lyon, in support of the argument that the "edge of the stream" means low water, relies upon the briefs of the parties in the case, which discussed the import of sections 830 and 670. Reference in a brief to these statutes is insufficient to clarify the ambiguous language employed by the court.[11]

The case most favorable to the position of Lyon is the *City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [52 P.2d 585]. There the court declared that the title of private landholders in a navigable nontidal lake extended to low water mark, citing section 830, and that the state was the owner below low water, citing section 670. However, the statement was dictum, since the only issue in the case was whether Los Angeles, which sought to condemn fee simple title to the littoral rights of landowners to maintain the natural level of the lake, could avoid payment of substantial damages because of the poor quality of the water for domestic use.[12]

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[11]*Packer* was affirmed by the United States Supreme Court, which also employed ambiguous language in its decision. (*Packer v. Bird* (1891) 137 U.S. 661, 672 [34 L.Ed. 819, 822, 11 S.Ct. 210].) Later decisions of the high court cited *Packer* for the proposition that the jurisdiction of California in nontidal navigable waters extends to high water. (*Hardin v. Jordan, supra*, 140 U.S. 371, 382-383 [35 L.Ed. 428, 433-434]; *Shively v. Bowlby, supra*, 152 U.S. 1, 44-45 [38 L.Ed. 331, 347-348].)

[12]Other cases relied upon by Lyon either make no reference to section 830 (*Maginnis v. Hurlbutt* (1920) 49 Cal.App. 460 [193 P. 606]; *Crews v. Johnson* (1962) 202 Cal.App.2d 256, 258 [21 Cal. Rptr. 37] [in a dispute between adjoining littoral owners at Clear Lake, the court stated that the parties conceded that private owner-

The People rely primarily on *Churchill Company v. Kingsbury* (1918) 178 Cal. 554 [174 P. 329]. In that case, the petitioner sought to compel the surveyor-general to perform acts preliminary to issuance of a patent for the lands between high and low water in Little Klamath Lake, which the court found to be navigable. The petitioner relied upon the terms of an 1893 statute in support of his claim. It was held that the statute did not authorize the issuance of the patent. In the course of its opinion, the court noted that the petitioner took the position that "the land is, in fact sovereign land of the state, and in this, we think it is clearly right." (178 Cal. at p. 558.) The statement was dictum, the court did not cite section 830, and Lyon points out that the briefs of the parties in the case did not bring the section to the attention of the court. (See also *People v. Morrill* (1864) 26 Cal. 336, 356.)

If the decisional law is ambiguous regarding whether section 830 constitutes a grant or a rule for the construction of deeds, the same cannot be said of the administrative interpretation of the provision. Lyon has produced a voluminous body of evidence demonstrating that, with few

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ship of the submerged lands extended to low water]) or refer to the section but do not discuss its meaning (*Craig v. White* (1921) 187 Cal. 489, 492 [202 P. 648] [the court cited § 830 for the proposition that patents issued by the federal government conveyed title to the patentees to "the actual margin of the lake"]; *Foss v. Johnstone* (1910) 158 Cal. 119, 130 [110 P. 294] [citing § 830 as setting forth "certain incidents attaching to lands bordering upon waters" in a case involving a nonnavigable pond].) In *United States v. Gossett* (9th Cir. 1969) 416 F.2d 565, 568-569, the court classified California as a low water jurisdiction, apparently based largely upon the disclaimer by California's Attorney General to ownership of the state above that line.

exceptions, state authorities, including the Attorney General, took the position until at least 1970 that by virtue of the provisions of section 830 the state claimed ownership only to the low water mark. (See 43 Ops.Cal.Atty.Gen. 291, 295 (1964); 30 Ops.Cal.Atty.Gen. 262, 269 (1957); 23 Ops. Cal.Atty.Gen. 306, 307 (1954); 23 Ops.Cal.Atty.Gen. 97, 98 (1954).) In 1970, the Attorney General reexamined this position, and reversed his opinion, and in the trial of a condemnation action involving the Feather River (People v. Shasta Pipe and Supply Co. (Sup. Ct. Butte Co., No. 37390), and in other actions thereafter, asserted that the state owned the land under navigable lakes and streams to high water. In 1977, the Attorney General advised the State Lands Commission of this position.

According to affidavits, the files of the State Lands Commission contain hundreds of letters stating or implying that the state's ownership extends waterward of the ordinary low water mark.

Finally, the Legislature has impliedly accepted the low water mark of Clear Lake as the boundary of the state's ownership. The state has conveyed to Lake County its title to Clear Lake, in trust. The language of the grant assumes that the state's interest is to low water mark. (Stats. 1973, ch. 639, § 1, p. 1165.)[13]

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[13]Section 1 of the statute, after granting to the county, in trust, the state's interest in Clear Lake, provides, "The low water mark for Clear Lake has not been determined, and such determination may have to be made by judicial adjudication. Subject to such later determination and for the purpose of the administration of this grant only, the low water mark shall be considered by the parties to this grant as being zero on the Rumsey Gauge." The Rumsey

We are aware of the rule that the administrative construction of a statute is not necessarily determinative (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756-757 [151 P.2d 233, 155 A.L.R. 405]), but we cannot ignore these long-continued and frequently expressed views to the effect that section 830 constitutes a grant to private persons of title to the beds of navigable, nontidal bodies to low water mark. It cannot be said that the statute is so clear and unambiguous that these expressions may be disregarded. In this connection, we note that two states which adopted a statute similar to section 830 as part of the Field Code, interpret their enactments as conveying title to riparian owners to the low water mark in navigable, nontidal waters. (Mont. Rev. Codes 1947, § 67-712; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328, 331, 42 A.L.R. 937]; N.D. Cent. Code, § 47-01-15; *Hoque v. Bourgois* (N.D. 1955) 71 N.W.2d 47, 52 [54 A.L.R.2d 633].)[14]

We conclude, therefore, that Lyon has title to the low water mark of Clear Lake.

Gauge refers to a method by which Captain George Rumsey established the level of Clear Lake. The intersection of zero on that gauge with an elevation of 1,318.65 feet may represent the low water mark of the lake.

[14]There is no merit in the argument of the People that because section 830 has been employed to construe deeds in disputes involving nonnavigable waters (*Hess v. Merrell* (1947) 78 Cal.App. 2d 896, 899-900 [178 P.2d 467]) and tide waters (*Lynch v. Kupfer* (1933) 134 Cal.App. 652, 656 [26 P.2d 33]), the provision cannot be viewed as a rule of property in nontidal cases. We find nothing inconsistent in the notion that the provision may state a rule of property and may also constitute a rule for the construction of deeds.

We come, then, to the question whether the grant of lands between high and low water made by section 830 to riparian landholders is free of the trust described in *City of Berkeley*. It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust. Instead, unless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public. This was the holding in *City of Berkeley* and in *People v. California Fish Co.* (1913) 166 Cal. 576, 596 [138 P. 79].

In *City of Berkeley*, we were concerned with whether 22,299 acres of tidelands in San Francisco Bay, granted to private persons by deeds purportedly in fee, between 1868 and 1870, were subject to the tidelands trust. We answered this question in the affirmative. We observed that under the venerable doctrine of the tidelands trust, which had its origin in Roman law, tidelands are owned by the state in trust for the public, for their use for commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state. Grants of such lands to private persons are subject to the trust unless the conveyances are made to enhance trust purposes. We determined that the grants in question were not made for such purposes, and that in any event, the state was not empowered to make such vast grants to private parties in its role as trustee.

The holding of *California Fish* is similar. There it was decided that, although various statutes authorizing the alienation of tidelands into private ownership effectively

passed title, the grantees took subject to the rights of the public because the grants in question were not made for the purpose of promoting the aims of the trust.

Lyon and amicus California Land Title Association urge that there is not and never has been a doctrine that nontidal, navigable waters are subject to a public trust. Rather, they claim, such waters are impressed only with a "recreational or navigational easement" which allows the public to use only the waters, so that when they rise above low water mark, the public may use them for navigation or fishing, but the bed between low and high water belongs to the riparian owner and when the water recedes the public has no right to use of the land above the low water mark.

The People and supporting amici curiae rely upon article X, section 4 of the Constitution,[18] which provides for freedom of access to and the right of navigation upon waters that are navigable. They rely also upon numerous cases which declare that California owns the lands under navigable waters in trust, without distinguishing between tidal and nontidal bodies in this regard. (See, e.g., *Colberg, Inc. v. State of California* (1967) 67 Cal.2d 408, 416 [62 Cal.Rptr. 401, 432 P.2d 3]; *Boone v. Kingsbury* (1928) 206

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[18]This provision was adopted in 1879 as article XV, section 2. It states: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Cal. 148, 189 [273 P. 797]; *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138, 151 [4 P. 1152].)

In our view, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], which we described in *City of Berkeley* as the "seminal case on the scope of the public trust doctrine" (26 Cal.3d at p. 521), settled the issue. It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.

Illinois Central involved a grant by the State of Illinois of 1,000 acres of the bed of Lake Michigan constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The high court held that the grant was revocable, that the state held these lands in trust for the public, and that it was powerless to relinquish its rights as trustee. The opinion addressed itself specifically to whether the trust doctrine was inapplicable because there was no appreciable tide in Lake Michigan. It rejected this premise in the following unmistakable language: ". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands . . . under tidewaters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters . . . being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over

the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lan s under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." (146 U.S. at pp. 436-437 [36 L.Ed. at pp. 1036-1037].)

Lyon and amicus California Land Title Association insist that the holding of *Illinois Central* is confined to the Great Lakes, which are "special because of their size and importance in interstate commerce." While it is true that the opinion emphasizes the importance of the Great Lakes for commerce, the portion of the opinion quoted above makes it clear that it is navigability which is the touchstone in determining whether or not the public trust applies. The application of the trust doctrine to tidal waters is not confined to those bodies which are huge in size and important for purposes of commerce; we can see no reason why such a test should not be applied to nontidal waters. Nor does *Illinois Central* set forth a special rule relating to Lake Michigan. Other jurisdictions have recognized that the doctrine enunciated in that case applies to nontidal bodies which cannot be characterized as "inland

seas." (E.g., *State v. Southern Sand & Material Co.* (1914) 113 Ark. 149 [167 S.W. 854, 856]; *State v. Korrer* (1914) 127 Minn. 60 [148 N.W. 617, 623]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796, 801]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249, 251 23 A.L.R. 748]; *State v. Public Service Commission* (1957) 275 Wis. 112 [81 N.W.2d 71, 73-74.)[16] It is noteworthy that South Dakota, like California, has adopted a provision similar to section 830 but, as *Flisrand* makes clear, the state has impressed a trust for public uses on the riparian owner's property between high and low water.

Another matter of interest in this connection is that an opinion of the California Attorney General relied upon by Lyon for the proposition that section 830 has been interpreted by state officials as setting a low water boundary for public ownership explicitly qualified this opinion by the statement that the riparian owner's title between low and high water is held in trust to preserve the rights of commerce and navigation for the public. (43 Ops.Cal. Atty.Gen., *supra*, 291, 294.)[17]

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[16]In support of this assertion, Lyon states that other navigable waters in Illinois, such as the Mississippi River, are owned by private parties. (Citing *City of St. Louis v. Rutz* (1891) 138 U.S. 226, 242 [34 L.Ed. 941, 947-948, 11 S.Ct. 337]; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296, 299].) In *Appleby v. City of New York* (1926) 271 U.S. 364, 395 [70 L.Ed. 992, 1004, 46 S.Ct. 569], it was said that although *Illinois Central* was "necessarily a statement of Illinois law," the general principle declared therein has been recognized throughout the country.

[17]The opinion states, "[U]pon its admission to the Union, California acquired title to all land below the high water mark of all navigable water within its territory, whether or not such water was tidal. This title is held in trust for the people of the State, in order

Our conclusion that the public trust is applicable to nontidal waters is also pertinent to the consideration of Lyon's argument, apparently accepted by the trial court, that as to the area between high and low water the public has an interest only in the water itself, so that it may use the water for boating and fishing, but when a lake or stream is at low water, the public has no right to use the bed to the high water mark. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374], we held that, although early cases had expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.

We see no justification in reason or authority for the proposition advanced by Lyon. In *People* ex rel. *Baker v. Mack* (1971) 19 Cal.App.3d 1040 [97 Cal.Rptr. 448], relied upon by Lyon as holding that the public interest in nontidal waters is confined to the waters themselves, the primary issue was the navigability of a section of the Fall River, which defendants had obstructed by erection of booms, fences and bridges, preventing plaintiff from boating, hunting and fishing in the stream. The court adopted a broad definition of navigability, holding that any waters which could be used for recreation were navigable and

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to preserve the right of commerce and navigation for the public. . . .

"There is no requirement that the state claim all land below high water mark. As long as the rights of the public are not impaired, the state may permit private ownership of land beneath non-tidal, navigable waters."

could be used by the public. In the course of its opinion, the court made the following statement, upon which Lyon relies: "[M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft." (19 Cal.App.3d at p. 1050.)

We fail to see how Lyon can find comfort in this statement. It does not mean that the public's rights are confined to the waters as such, but merely attempts to distinguish between waters capable of commercial use—which were there claimed to be the test of navigability—and those capable of recreational use. Other cases cited by Lyon also fail to support his position.[18]

Nevertheless, argues Lyon, there is a sound reason in logic why tidal and nontidal waters should be treated

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[18]*Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [127 Cal.Rptr. 830], was an action for declaratory relief to determine whether a certain portion of the Russian River was navigable. The court adopted the broad recreational use test of navigability set forth in *People* ex rel. *Baker v. Mack, supra,* 19 Cal.App.3d 1040, 1050, and held that the river was deemed in law to be navigable even though it was not in fact navigable for some part of the year.

In *Bohn v. Albertson* (1951) 107 Cal.App.2d 738 [238 P.2d 128], a tract of land was flooded when a levee broke. The flooding converted the land into a navigable body of water, upon which pleasure boats sailed and the public fished. It was held that the landowner could not charge the public for use of the water because while it was subject to recreational use it was a navigable body. However, the court held that the landowner had the right to reclaim the land since he had not lost title when it was suddenly flooded by the break in the levee, in accordance with the established rule governing avulsion.

differently insofar as these public's rights are concerned. He asserts that because tidelands are subject to inundation on a daily basis and nontidal waters are inundated only seasonally, tidelands are constantly subject to use for commerce, navigation and fishing, while the strip of land between low and high water in a nontidal body is only useful for such purposes for a limited portion of the year. Therefore, he concludes, the necessity for impressing nontidal waters with the public trust is greatly reduced.

But this contention is predicated on an exceedingly narrow view of the purposes of the public trust. As Justice McComb pointed out for a unanimous court in *Marks v. Whitney, supra,* 6 Cal.3d 251, 259, the public's rights in tidelands are not confined to commerce, navigation and fishing, but include recreational uses and the right to preserve the tidelands in their natural state. We discern no valid reason why the scope of the public's right in nontidal waters should not be equally broad. Lyon's assertions in this regard imply the resurrection of the common law distinction between tidal and nontidal waters —a distinction which has been thoroughly discredited in this country. As was said in *Illinois Central,* when the United States rejected the English rule that admiralty jurisdiction was confined to tidewaters because it was inapplicable to the conditions in this country, "the limitation and all its incidents were discarded." (146 U.S. 387 at p. 436 [36 L.Ed. 1018 at p. 1036].) We hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water.

In *California Fish* it was held that a statute authorizing the conveyance of tidelands will not be interpreted to abandon the public trust unless no other interpretation is reasonably possible. Nothing in the language of section 830 requires a conclusion that riparian landholders take free of the public's rights in the lands between low and high water in navigable lakes and streams. We conclude, therefore, that Lyon's title to such lands is impressed with the public trust.

Lyon's final argument is that his ownership of the Anderson Marsh to low water free of the public trust is a "rule of property" and that a determination applying a trust to such property would accomplish a taking of private property in violation of federal and state constitutional provisions. He relies upon cases which recognize the protection of property rights afforded by the federal and state Constitutions. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701]; *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273-274 [157 Cal. Rptr. 372, 598 P.2d 25]; *House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 391 [153 P.2d 950].) (4) (See fn. 19.) We doubt whether any failure of the state to previously assert its trust rights in the lands below high water (but see 43 Ops. Cal. Atty. Gen., *supra,* 291, 294) constitutes a "rule of property."[19]

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[19]In *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 456 [328 P.2d 484], a "rule of property" was defined as "A settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. . . . The principle appears to be an extension of the *'stare decisis'* rule, which . . . seems to apply with peculiar force and strictness to decisions which

Indeed, in some respects, our holding constitutes less of an interference with property rights than occurred in *Illinois Central, California Fish,* and *City of Berkeley.* In those cases, the landowners had received outright grants from the state, purportedly in fee, while the title of Lyon to the lands in issue here is based only upon administrative interpretation of an ambiguous statute. In *Illinois Central* the high court held that the grant of the lands in question was revocable—not merely that the railroad held the property subject to the trust—on the ground that "[t]here can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." (146 U.S. 387, at p. 460 [36 L.Ed. 1018, at p. 1045].) And, in *California Fish,* in response to an argument by the grantees that the public should be estopped to claim any interest in the tidelands it had sold into private ownership, the court declared that the grantees had received title to the soil (subject to the public trust), and that they had "received consideration for their money, and it is to be presumed that they bought

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have determined questions respecting real property and vested rights. . . ."

Lyon's reliance on the "rule of property" which he espouses is open to question. The agreement under which he purchased Anderson Marsh provides that the seller does not warrant ownership of lands below zero mark on the Rumsey Gauge, and it makes provision to set aside some of the purchase monies in trust in the event a governmental body claims property above that point. Moreover, title insurance policies relating to the property except from coverage claims of the state to any portion of the property lying within the bed of the lake, any rights of the public for commerce, navigation or fishing, and any adverse claim to lands created by artificial means.

with knowledge of the law on the subject." (5) (See fn. 20.) In at least two jurisdictions in which the matter has been considered, the fact that the land between high and low water is owned by private parties is held not to prevent the imposition of the public trust to the high water mark. (*State v. Korrer, supra,* 148 N.W. 617, 623; *Flisrand v. Madson, supra,* 152 N.W. 796, 801.)[20]

We emphasize that Lyon is not deprived of the use of the lands between low and high water, and that he may utilize them in any manner not incompatible with the public's interest in the property.[21]

Let a writ of mandate issue directing the trial court to vacate its order granting Lyon partial summary judgment, and to grant the People's motion for partial summary judgment insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

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[20]The People raise an additional question regarding the correctness of the trial court's ruling. The court determined that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" ordinary low water mark of the lake, i.e., the water level in existence prior to the construction of a dam in 1914. The People argue that the proper standard of measure is the lake in its current condition. This issue is also presented in *State of California v. Superior Court (Fogerty)* (1981) *post,* at page 240 [—Cal.Rptr.—, —P.2d—], and it is discussed in the opinion in that case. We conclude that the position of the People is correct, and that the determination of the boundary between public and private ownership must be assessed in accordance with the shoreline of the lake as it exists presently.

[21]Lyon has moved to strike the People's "Replication to Answer to Petition for Writ of Mandamus" and an appendix to that brief. The People filed a motion to strike certain portions of the brief of amicus curiae California Land Title Association. These motions are denied.

CLARK, J., Concurring and Dissenting.—The majority opinion overwhelmingly establishes that by statute, case authority and practice California historically has not claimed title to land between the high and low water marks of inland bodies of water. I thus concur in the majority holding that Lyon has fee title to lands above the low water mark of Clear Lake.

However, I must dissent from the holding that lands lying along navigable streams and lakes between high and low water levels are subject to the tidelands and submerged lands trust. That trust should be limited to tidelands as its name implies—lands covered and uncovered by the flow and ebb of the tide—and submerged lands. Historically, the trust has not been applied to land between high and low water mark on navigable lakes and streams (the shorezone). To the contrary, millions of acres have been reclaimed between high and low water for residential, agricultural, and general governmental uses—uses which would have been and are improper if the trust doctrine is applicable. History establishes it would have been against public policy—greatly impeding the development of the resources of our state—to have applied the trust doctrine. To apply that doctrine for the first time today casts clouds on thousands if not millions of land titles and uses, and jeopardizes agricultural and residential uses of millions of acres which are presently so used and are far more valuable for farm and home than for trust uses. While public recreational and ecological uses of the shorezone are important considerations, the state has and is providing for such uses. Application of the trust to millions of acres historically and

presently within the shorezone is overkill, contrary to public policy, and an inequitable infringement on long-settled and vested titles.

I. The Trust

The common law trust at issue has repeatedly been described by our courts as applying to tide and submerged lands. (E.g., *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 518-519, fn. 1 [162 Cal.Rptr. 327, 606 P.2d 362]; *Marks v. Whitney* (1971) 6 Cal.3d 251, 257, fn. 1 [98 Cal. Rptr. 790, 491 P.2d 374]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482 [91 Cal.Rptr. 23, 476 P.2d 423]; *San Diego County Archaeological Society Inc. v. Compadres* (1978) 81 Cal.App.3d 923, 925 [146 Cal.Rptr. 786].) The Clear Lake lands now at issue are not tidelands—they are not daily covered and uncovered by the flow and ebb of tide water. (See *Marks v. Whitney, supra,* 6 Cal.3d 251, 258; *People v. Kerber* (1908) 152 Cal. 731, 733 [93 P. 878].) Unlike tidelands the instant shorezone is uncovered for long periods of time—often the better part of a year. Tidelands unlike the instant lands are covered and uncovered twice each day by salt water, which—unlike the waters of Clear Lake—severely limits use of underlying lands for agricultural purposes. The instant shorezone land is obviously not submerged land.

Before considering historical matters requiring rejection of the majority's extension of the trust to shorezones, we should first consider the trust as it applies to true tide and submerged lands.

Tidelands and submerged lands owned by the state are held in trust for public purposes of navigation, commerce and fisheries. (*City of Long Beach v. Mansell, supra,* 3 Cal. 3d 462, 482; *People v. California Fish Co.* (1913) 166 Cal. 576, 584 [138 P. 79].) Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers "only bare legal title," and the property remains subject to the public trust easement. (*Id.*) The decisions of this court have established that the trust is a limitation on governmental as well as private reclamation activities. (*City of Long Beach, supra,* 3 Cal.3d 462, 482-486; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 38 [48 P.2d 20]; *City of Oakland v. Williams* (1929) 206 Cal. 315, 327-328, 330-331 [274 P. 328].)

The uses permitted within the trust are described in *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], as follows: "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations.] The public has the same rights in and to tidelands. [¶] The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citations.] There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their

natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorable affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands."

Permissible uses of tidelands whether by government or private citizens are numerous within the broad terms of the public trust for navigation, commerce, fishing and other purposes. For example, in *City of Oakland v. Williams* (1929) 206 Cal. 315, 319-323 [274 P. 328], this court upheld the use of such lands by a private party for a warehouse to be used for shipping, processing, and packing dried fruits. (See *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P.2d 20].)

Nevertheless, there are certain common land uses which are not included within trust uses, namely, residential, agricultural, and general governmental. Individuals as well as government may enforce the trust. (*Marks v. Whitney, supra*, 6 Cal.2d 251, 261-262.)

Reclamation of tidelands does not in and of itself terminate the public trust. (*Marks v. Whitney, supra*, 6 Cal. 3d 251, 261; *City of Long Beach v. Mansell, supra*, 3 Cal. 3d 462, 483; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 402 [60 P.2d 825]; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40-41 [48 P.2d 20].) However, if the Legislature finds and determines that particular lands are no longer useful for trust purposes, it may free them from the trust. (*Marks v. Whitney, supra*, 6 Cal.3d 251, 260; *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 482.)

Statutes purporting to terminate the public use will be carefully scanned to determine whether that was the legislative intent. (*City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, 525.)

II. The Shorezone Historically

We were taught in elementary schools that geographical conditions encountered by early settlers of our great California valleys were significantly different from those presently existing. Winter and spring rains and snows melting in the Sierras created great inland seas in the center of California. The width of rivers measured by feet in summer extended to miles during parts of the spring.[1] While the land regularly covered by water was as rich as any in the world, it could only be effectively farmed after the water receded. The flooding and short growing season limited production of crops and improvements which could be made.

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[1]Historically, the Sacramento River has carried off the annual spring flow of seasonal rains and melting snows which arise in surrounding mountains. Large basins were formed as vast amounts of water regularly overflowed river banks. During spring seasons, the total basin covered 1,250 square miles and in extraordinary years 1,700 square miles. When spring flood waters evaporated, the most fertile and productive agricultural land was exposed. (See, Rep. of A Board of Engineers Upon Examination of Sacramento, San Joaquin, and Feather Rivers, Cal., H.R. Doc. No. 262, 59th Cong., 1st Sess., p. 6 (1905); Rolle, California: A History (1969) pp. 370-371.) Similarly, the Fresno River (*Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 63-64 [99 P. 502], and the San Joaquin River (*Herminghaus v. So. California Edison Co.* (1926) 200 Cal. 81, 87-88 [252 P. 607]) have traditionally overflowed during the spring time to produce large marshland areas, which were subsequently highly productive.

Much of the history of California is tied to reclamation and farming of the state's rich bottom land. Such reclaimed lands have become some of the world's most productive farmland. Other large areas of reclaimed land have been used for urban development. For example, much of Sacramento is built upon reclaimed land. (E.g., *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 626-631 [163 P. 1024] (Sacramento and Feather Rivers); *Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 67 et seq. [99 P. 502] (San Joaquin River); *Modoc L. & L. S. Co. v. Booth* (1894) 102 Cal. 151, 153 et seq. [36 P. 431] (Pitt River).)

In addition to tracts now protected from flood waters there remain large tracts that—while flooded in winter and spring—are naturally drained and farmed in the summer and fall. For example, the Yolo Basin, which is used during the annual runoff to reduce flood pressure on other areas (see, *Gray v. Reclamation District No. 1500, supra,* 174 Cal. 622, 631), is an area of many square miles and is put to productive farm use when the waters recede.

Similarly, not all homes built within the shorezones are free from regular flooding. Thousands of such homes remain, for example, along the Russian River. These shorezone homes are regularly flooded.

The acres of reclaimed land which have been put to productive agricultural and residential use numbers in the millions. So far as I am aware, the Legislature has never found or determined such reclaimed lands useless for trust purposes or free of the trust. Indeed, it is by no means clear the Legislature could have found or could

now find such reclaimed lands or even the greater portion thereof useless for trust purposes when we remember that among such purposes are recreational and ecological uses. While the lands may be extremely valuable for agricultural and residential purposes, a balancing of values is not the test under the trust doctrine. The test is lack of value for trust purposes. In addition, it must be pointed out that the government exacted a ransom of $783,500 to clear the title of the homeowners in the subdivision in the asserted tidelands area involved in *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 475.

The history of development of our great agricultural valleys and related residential development is directly in conflict with the asserted common law trust the majority seek to impose.

The majority trust doctrine is not merely in conflict with the private assertion of fee interest to reclaimed lands, but it is abundantly clear the state has encouraged and provided for such uses. One need only examine the three volumes of West Publishing Company's Appendix to our Water Code to note the collection of statutes enacted by our Legislature to establish reclamation districts which were obviously designed to further private agricultural use of reclaimed lands. While such districts may have also furthered navigational purposes on the concerned bodies of waters, it would be unreasonable to conclude that assessments against reclaimed lands to finance the costs of reclamation did not reflect increased values of properties as agricultural lands or that reclamation districts were not created with the intent the lands were to be used for agri-

cultural purposes. Further, numerous municipalities in historical shorezone areas have approved subdivisions for residential development and have provided residential services, all of which activities are in conflict with the majority's trust.

In concluding that in the past 130 years there has been a public policy to maintain land in its natural state or to limit historical shorezones to trust uses, the majority blind themselves to the historical development of controlling law. This law recognizes what highly productive members of our society undertook to forge, not only to serve their needs but also to serve the needs of society with the authorization, approval and encouragement over the years of our Legislatures, Governors, and local governmental agencies.

Application of the trust doctrine to the shorezone is contrary to California public policy. Rather than precluding farming and residential use of the shorezone, the policy has been to encourage reclamation and farming and residential use of these properties.

Protection of parts of our historic shorezone for the purposes permitted by the trust is a worthy endeavor but it should not be accomplished with a blunderbuss that confiscates thousands—perhaps millions—of titles, and jeopardizes existing use of millions of acres of residential and farm lands. While, as the majority recognize (*State of California v. Superior Court* (*Fogarty*), *post*, p. 240 [— Cal.Rptr. —, — P.2d —]), the state must compensate the landowner for improvements should it choose to exercise the trust and take property for park or other purpose,

it is not required to compensate for taking the land. From time immemorial landowners within the shorezone have conducted themselves in good faith as if they were owners in fee, and the land (apart from improvements) has been assessed and taxed as in the case of all fees not subject to the state's assertion of a right to take under a trust. To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible.

In concluding that the trust doctrine must extend to the shorezone the majority rely mainly upon *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110] where the Supreme Court held that a grant of *submerged* lands in Lake Michigan was subject to the trust. (*Id.*, at p. 452 et seq. [36 L.Ed. at p. 1042 et seq.].) The court expressly recognized that it did not impose a trust on the shorezone. It stated: "If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown . . ." (*Id.*, at p. 450 [36 L.Ed. at p. 1041].) The court's order was to the same effect. (*Id.*, at p. 464 [36 L.Ed. at pp. 1046-1047].)

Far from serving as authority to extend the trust to freshwater shorezones, *Illinois Central Railway* reflects it is *only* navigable submerged lands that are subject to the trust.

I would deny mandate.

Richardson, J., concurred.

Appendix C

Statutes

Civil Code § 670.

The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the State; and of all property of which there is no other owner.

Code of Civil Procedure § 2077.

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

* * *

5. When tide water is the boundary, the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-mark are included in the conveyance.

* * *

Appendix D

Denial of Fogerty Petition for Rehearing

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

April 29, 1981

I have this day filed Order

REHEARING DENIED

In re: S.F. No. 24035

State of California

vs.

Superior Court, Placer

Respectfully,

Clerk

Appendix E

Appellate Court Decision (Fogerty)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SEE CONCURRING OPINION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR
THE THIRD APPELLATE DISTRICT
(Placer)

3 Civil 17381
(Super. Ct. No. 48281)

CHARLES F. FOGERTY, et al., Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA, et al., Defendants and Appellants.

[Filed Mar. 28, 1979]

Defendants appeal from a preliminary injunction order. As will appear, without addressing the merits, we shall conclude that the trial court did not abuse its discretion in issuing the preliminary injunction.

The events leading to the injunction are as follows: by letter dated March 8, 1977, the Attorney General advised the State Lands Commission ("Commission") of the State's claim of sovereign ownership—to ordinary high-water mark—of the beds of non-tidal navigable lakes and streams throughout California. Pursuant to this advice, the State Lands Commission announced its intention to record notices of such claim in the counties where

navigable lakes and streams are located. Plaintiffs, alleging ownership interests in Lake Tahoe waterfront property, sought to restrain the Commission from recording such notices unless the notices consisted of a lis pendens filed in conjunction with a legal proceeding. As requested, the trial court issued a preliminary injunction prohibiting the Commission from recording such notices.

Defendants have the right to appeal from an order granting a preliminary injunction. (Code Civ. Proc., § 904.1, subd. (f).) However, the scope of inquiry on appeal is limited so that the reviewing court will not interfere with the trial court's order in the absence of a showing of clear abuse of discretion. (Weingand v. Atlantic Sav. & Loan Assn. (1970) 1 Cal. 3d 806; Continental Baking Co. v. Katz (1968) 68 Cal.2d 512; Porter v. Jennings (1891) 89 Cal. 440.) Nevertheless, the parties' briefs exhaustively argue the heart of the underlying dispute.

The substantive issue is whether the land between the ordinary high and low water marks along the shorelines of navigable lakes and streams is in State or private ownership. The State urges us to resolve this issue on this appeal from the preliminary injunction order. The trial court's issuance of a preliminary injunction order, however, neither attempts to adjudicate nor has the effect of adjudicating the merits of the ultimate controversy. (Patterson v. Board of Supervisors (1875) 50 Cal. 344; Socialist Workers etc. Committee v. Brown (1975) 53 Cal.App.3d 879.) Rather, it simply preserves the status quo pending trial (Continental Baking Co. v. Katz, supra, 68 Cal.2d at p. 534; People v. Black's Food Store (1940) 16 Cal.2d 59; West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal.App.3d 693), so that final resolution on

the merits may not become ineffectual. (Froomer v. Drollinger (1960) 183 Cal.App.2d 787.) Here, then, the trial court's granting of the preliminary order succeeded in restraining the Commission's recording of notice without proceeding further to comment one way or another on the strength of opposing claims to the lakeshore property. (See Bomberger v. McKelvey (1950) 35 Cal.2d 607; Miller & Lux v. Madera Canal etc. Co. (1909) 155 Cal. 59.) Consequently, at this stage of the litigation, we as an appellate court do not determine the rightful owner of the lakeshore property, but properly confine ourselves to a review of the propriety of the trial court's issuance of the preliminary injunction against the Commission. (Continental Baking Co. v. Katz, supra, at p. 512; Patterson v. Board of Supervisors, supra, 50 Cal. 344; State Bd. of Barber Examiners v. Star (1970) 8 Cal.App.3d 730; French Art Cleaners v. St. Bd. etc. Cleaners (1949) 91 Cal.App.2d 890.)

The Supreme Court, in Continental Baking Co. v. Katz, supra, at page 528, has described the mechanics by which a trial court, in balancing the respective equities of the parties, decides whether to grant or deny a request for a preliminary injunction: ". . . the court examines all of the material before it in order to consider 'whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; . . .' [Citations.] In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case, and it has been said, will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful in the assertion of his rights. [Citations.] As was said in *Family Record Plan, Inc. v. Mitchell* (1959) 172 Cal.App.2d 235, 242 [342

P.2d 10], 'In the last analysis the trial court must determine which party is more likely to be injured by the exercise of its discretion [citation] and it must then be exercised in favor of that party [citation].' "

The preliminary injunction here preserved plaintiffs' existing claims to the property extending to the low water mark of Lake Tahoe. The State has demonstrated no significant injury that would result to it from a granting of the preliminary injunction order. On the other hand, plaintiffs have asserted that they would stand to incur substantial harm from a refusal of their request for a preliminary injunction. Based on respondents' reasonable likelihood of prevailing on the merits, the trial court, within the appropriate bounds of its discretion, could have concluded that denial of the preliminary injunction order would threaten to cloud title so as effectively to prevent respondents' transfer of the lakeshore property, or would otherwise threaten to interfere with any interests in the lakeshore property presently possessed by respondents.

Finally, we do not agree with State that it is beyond the reach of injunctive relief in the instant circumstance because the application of Civil Code section 830 to these facts is the very question in issue in this litigation. (Cf. Code Civ. Proc., § 526, subds. 4 and 6; Civ. Code, § 3423, subd. (4).)

The order granting the preliminary injunction is affirmed.

REYNOSO, J.

I concur:

PUGLIA, P.J.

Who owns the land between the ordinary low-water mark and the ordinary high-water mark along the shoreline of California's *non-tidal*[1] navigable waters, including Lake Tahoe? Is it the State or the bordering property owner?

From at least 1916, and until 1970, the Attorney General of California took the position that the State owned the beds of non-tidal navigable lakes and streams only to *ordinary low-water mark*. (Ops.Cal.Atty.Gen. 3100, pp. 5-6 (1916); 23 Ops.Cal.Atty.Gen. 97 (1954); 43 Ops.Cal.Atty. Gen. 291 (1964).) By its letter of March 8, 1977, however, the Attorney General advised the State Lands Commission that the State asserts, and since 1970 has been asserting, sovereign ownership of the beds of navigable lakes and streams to *ordinary high-water mark*. When the Commission thereafter announced its intention to record notice of the State's claims in the recorder's office of counties where such lakes and streams are located, certain owners of property bordering on Lake Tahoe filed this action and obtained the challenged preliminary injunction against such recordation.

I

The majority does not reach the merits of the controversy. My colleagues conclude that on appeal from the issuance of a preliminary injunction they need only decide whether there is a reasonable probability that plaintiffs will ultimately prevail and whether a greater injury will

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[1]Crucial to a proper understanding of this case is the constant awareness that only non-tidal waters are involved. As I note hereinafter, non-tidal and tidal waters are governed by separate and different rules of law.

result from granting the injunction than from denying it. That general proposition is both correct (Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528) and applicable here; therefore I concur in the majority opinion. But unlike the majority, I am not prepared to end the matter thus. Because I view the ownership issue, on the merits, as a pure question of law with a very clear answer, in the interests of judicial economy, I would resolve it here and now. No further evidence or hearing in the trial court could possibly change the result.

II

California Civil Code section 670, as enacted in 1872 and amended in 1873-1874, states: "The State is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; . . ."

This is clarified in Civil Code section 830, also enacted in 1872,[2] and amended in 1874 to read: "Except where the grant under which the land is held indicates a different intent, the owner of the upland (when it borders on tide-water) takes to ordinary high-water mark; *when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; . . .*" (Emphasis added.)

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[2]In its original form, section 830 provided:

"When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to the high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

Section 830 has been widely accepted as establishing ordinary low-water mark as the limit of California's sovereign lands beneath non-tidal inland navigable lakes and streams. In addition to such treatment in the line of Attorney General's opinions cited above, it has been so treated in a number of reported decisions, including Los Angeles v. Aitken (1935) 10 Cal.App.2d 460, 467; Crews v. Johnson (1962) 202 Cal.App.2d 256, 258; and United States v. Gossett (9th Cir. 1969) 416 F.2d 565. Moreover, I note from the limited record before us that certain of the conveyances of property bordering Lake Tahoe specifically describe the waterward boundary as the line of "ordinary low water." None of the conveyances in the record refer to high water.

The asserted rationale for the State's repudiation of its former position begins with an 1850 statute providing that ". . . unless inconsistent with applicable state law, the common law of England shall be the rule of decision." (Stats. 1850, ch. 95, p. 219; see now Civ. Code, § 22.2.) The Supreme Court in Lux v. Haggin (1886) 69 Cal. 255, 384-385 ruled: "The act of 1850 adopts the common law of England. . . . And the expression 'common law of England" designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. . . . And it was not the common law 'as the same was administered' at a certain date that it was adopted, but the common law. . . . The statute adopts the common law of England except where inconsistent with the constitutions and statutes, and there can be no good reason why, to ascertain the common

law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute."

The State then argues that pursuant to this definition the "common law" rule in 1850 (or at least prior to the enactment of section 830 in 1872) was sovereign ownership of non-tidal inland navigable lake and stream beds to ordinary high-water mark; once California adopted the high-water mark standard by "common law" incorporation, the subsequently enacted section 830 was but a "rule of construction of boundaries," in view of the introductory clause "[e]xcept where the grant . . . indicates a different intent." By its terms, the argument continues, section 830 does not purport to grant the State's sovereign lands and thus for sound policy reasons it cannot be construed as a *grant*, citing *inter alia*, People v. California Fish Co. (1913) 166 Cal. 576.

The State errs in its initial hypothesis. The common law was not sovereign ownership to high-water mark.

The earliest United States Supreme Court case to associate inland "navigable water" (and "high water") with title was Barney v. Keokuk (1876) 94 U.S. 324. In that landmark decision, the court summarized the American view of the common law of England on the subject: "By the common law, . . . [all lands beneath] navigable waters belong to the Crown; but as the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide-waters only, . . ." (*Barney, supra* at p. 337.) The court then pointed out that the

reason for the rule was equally applicable to nontidal navigable waters, ". . . that reason being, that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. . . ." (*Barney, supra* at p. 338.)

The court went on: "The confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation, in many States, of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin v. Waddell [(1842) 41 U.S. 367], Pollard v. Hagan [(1845) 44 U.S. 212], and Goodtitle v. Kibbe [(1850) 50 U.S. 471]. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of Genesee Chief v. Fitzhugh [(1851) 53 U.S. 443], has declared that the Great Lakes and other navigable waters of the country, above

as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the States by their inherent sovereignty,* and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." (*Barney, supra* at p. 338.) (Emphasis added.)

Thus Barney v. Keokuk held in 1876 that the States may or may not assert sovereign ownership over the beds of inland navigable lakes and streams to high-water mark; it also made clear that the English common law of high water applied to tidal waters only, even though logically it should have applied as well to non-tidal waters. At the time *Barney* was decided, California Civil Code section 830 had been in effect for four years, thus reflecting California's option to claim title only to the low-water mark.

Prior to *Barney*, we know of only one state, Iowa, which had clearly asserted a claim of high-water ownership. The claim was upheld by the Iowa Supreme Court in McManus v. Carmichael (1856) 3 Iowa 1, and it was a later challenge to this unique Iowa rule which brought about Barney v. Keokuk.

In an effort to expand the reach of *McManus* beyond the borders of Iowa, the State cites an 1868 text, Houck, *A Treatise on the Law of Navigable Rivers* (1868) pages 118-119, quoting as follows: "In investigating the cases, it will be noticed, that some of the courts, while they repu-

diate the supposed Common Law as inapplicable to our great inland rivers, and consider them as navigable in the highest and broadest sense, yet carry the ownership of proprietor of the verge of the bank to low-water mark, thus neither following the Common Law, nor wholly abrogating it. There is no authority in the Common Law for any such distinction. If rivers are navigable, the owners go to high-water mark only; if not navigable, they belong to the riparians; and these views the courts of New York and Iowa hold as applicable to the Mississippi and Mohawk." I find this unpersuasive. The treatise refers to two cases, *McManus* and The People v. The Canal Appraisers (1865) 33 N.Y.Ri (6 Tiffany) 461. *McManus* clearly supports the argument; *Canal Appraisers* does not, though it relies on *McManus* and can easily be misinterpreted as a "high water" case. In actual fact it holds only that the bed of the Mohawk River belongs to the State, without explicit reference to high or low-water mark. Other New York cases decided both before and after *McManus* clearly establish New York as a "low water" jurisdiction. (See Stewart v. Turney (1923) 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960, 967; Canal Commissioners v. People (N.Y. 1830) 5 Wend. 423, 467; Champlain And St. Lawrence Rail Road Co. v. Valentine (N.Y. 1853) 19 Barb. 484; Ransom v. Schaeffer (1934) 153 Misc. 199, 274 N.Y.S. 570.)

We are left then with Iowa as the only American jurisdiction to adopt a "high-water mark" rule regarding non-tidal waters prior to 1872. On the other hand, a great many states during this time either made *no* sovereign claims on the beds of non-tidal wate. or claimed only to low-water mark. (See e.g., Delaney v. Boston (1839) 2 Del.

(2 Harr.) 489; Jones v. The Water Lot Co. of Columbus (1855) 18 Ga. 539; Middleton v. Pritchard (1842) 4 Ill. (3 Scam.) 510; Berry v. Snyder (1867) 66 Ky. (3 Bush) 266; Brown v. Chadbourne (1849) 31 Me. 9; Browne v. Kennedy (Md. 1821) 5 Harris 195; Commonwealth v. Chapin (1827) 22 Mass. (5 Pick.) 199; Norway Plains Co. v. Bradley (1872) 52 N.H. 86; Cobb v. Davenport (1867) 32 N.J.L. 369; Palmer v. Mulligan (N.Y. 1805) 3 Caines R. 307; June v. Purcell (1881) 36 Ohio St. 396; State v. Columbia (1887) 27 S.C. 137; Miller v. Mann (1882) 55 Vt. 475; Canal Commissioners v. The People, supra, 5 Wend. at pp. 466-467; West Roxbury v. Stoddard (1863) 89 Mass. (7 Allen) 158; Carson v. Blazer (Pa. 1810) 2 Binney 475, 479; Naglee v. Ingersoll (1847) 7 Pa. 185.) As pointed out by plaintiffs, even now the majority of American states do not claim high-water mark ownership. To illustrate, I append hereto a copy of Appendix A to plaintiffs' brief, which the State has not challenged.

As for English common law, although the distinction between tidal and non-tidal waters was not nearly as clear as early American writers contended, by 1868 the English courts accepted the American view of English law and held that the beds of non-tidal navigable waters were "prima facie" in private ownership. (Murphy v. Ryan (1868) 2 Ir. R.C.L. 143; see MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water.* 3 Fla. St. U.L.R. 511, 585-587 (1975).)[3]

[3]As *MacGrady* points out, "*Murphy v. Ryan* was an Irish case and thus was not technically binding on English courts. But it was cited and followed in England. . . . (3 Fla.St. U.L.R. 511, 585, fn. 390.)

The fact that one state adopted a high-water rule prior to 1872 certainly does not establish that rule as the "common law" for purposes of incorporation into California law.

III

The State argues that even if we do not accept the common law incorporation argument, upon achieving statehood in 1850 the State must have succeeded to all the sovereign lands theretofore possessed by the United States; and since Barney v. Keokuk established that federal sovereignty extended to high water, the State must have succeeded to the same ownership. Once again relying on the policy reasons expressed in such cases as People v. California Fish Co., supra, the State argues that section 830 cannot be construed as a *grant* of hundreds of miles of sovereign shoreline to unnamed private owners.

The simple answer again is that *Barney* was not decided until 1876, and thus cannot be relied upon to establish federal sovereignty in 1850.

Furthermore, commentators who have considered similar difficulties posed by divergent federal and state definitions of *navigability* have taken the position that grants of land are not involved. Title simply "springs" to the private owner by operation of law: "Of course, if W is navigable under the federal test, the state takes title by sovereignty, which title can later spring to O [the private owner] under *Barney* if W is nonnavigable under the state test." (MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Impor-*

tance, and Some Doctrines That Don't Hold Water, supra at p. 603.)

I honor the language of section 830 and would hold that California's sovereign title to the beds of navigable nontidal lakes and streams extends to the ordinary low-water mark. Above that the shoreline is owned by the owners of the adjoining upland. Accordingly I conclude on the merits that the preliminary injunction was properly granted.

IV

Having enunciated my conclusion, I briefly explain some of the arguably contrary cases cited by the State.

A. A contrary dictum in Churchill Co. v. Kingsbury (1918) 178 Cal. 554, 558, relied upon in 52 California Jurisprudence Second, Waters, section 800, page 448, was based upon a stipulation of the parties. The case did not consider Civil Code section 830[4] and has never been followed. A later Supreme Court case, Craig v. White (1921) 187 Cal. 489, 491-492, held that a United States patent of property along the shore of Clear Lake "under the established rules governing such transfers, conveyed title to the patentees to the *actual margin of the lake.* (Civ. Code, § 830 . . . .)" (Emphasis added.) The court's ensuing citation to Civil Code section 830 compels an interpretation of the emphasized phrase consistent with the language of the statute; i.e., margin (edge) of the lake *"at low-water mark."*[5]

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[4]See 43 Opinions of the California Attorney General (1964) 291, 295, noting that the *Kingsbury* briefs also did not mention section 830.

[5]*Craig's* language and citation to section 830 were later quoted with approval in Anderson v. Trotter (1931) 213 Cal. 414, 421.

Moreover, cases which subsequently dealt with title to the very property involved in the *Churchill* decision concluded that the land in question *was not* sovereign property, but swamp and overflow land subject to conveyance by the State into private ownership in fee simple absolute. (Reynolds v. Churchill Co. (1921) 187 Cal. 543; Franklin v. Churchill Co. (1921) 187 Cal. 555; Franklin v. Churchill Co. (1925) 73 Cal.App. 304.)

B. The United States Supreme Court in Hardin v. Jordan (1891) 140 U.S. 371, 382-383, after discussing the Iowa high-water rule upheld in Barney v. Keokuk, supra, inaccurately stated, "The same view was taken in quite a recent case with regard to titles on the Sacramento River under the law of California," citing Packer v. Bird (1886) 71 Cal. 134. Actually, the one-page opinion in *Packer* simply held that the adjoining landowner's title extended "no farther than the edge of the stream." (71 Cal. at p. 135.) The court did not discuss what it meant by "edge of the stream," because the dispute involved title to an island in the center of the river. But since the major issue in the case was whether the 1872 or 1874 version of section 830 applied (under the 1872 version the upland owner along a navigable *stream* presumably took title to the *middle* of the stream[6]), the court's use of the statutory language "edge of the stream" must be taken to mean "edge of the . . . stream, at low-water mark."

The United States Supreme Court later reviewed the *Packer* decision (Packer v. Bird (1891) 137 U.S. 661),

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[6]This is apparent from reading the briefs of the parties in *Packer*, which were provided to the trial court and are therefore in the clerk's transcript.

but did not discuss its statement in *Hardin* that the case established a high-water rule. Rather it quoted the ambiguous "edge of the stream" language, even though that language was of no value in the court's formulation that title ". . . will be limited according to the law of the State, either to low or high-water mark, or will extend to the middle of the stream." (*Id.* at pp. 669-670.)

V

Plaintiffs necessarily concede "that a limited public easement for recreational navigation exists over waters which are navigable for recreational purposes, even though the waters may inundate private property. *Bohn v. Albertson,* 107 Cal.App.2d 738, 742-743, 752-753 (1951); *People Ex Rel* [*sic*] *Baker v. Mack,* 19 Cal.App.3d 1040, 1060 (1971); *Hitchings v. Del Rio Woods Recreation and Park District,* 55 Cal.App.3d 560, 571. . . ." The judicial definition of navigability is sufficiently flexible to insure that the public interest will be protected. (See the "contemporary test" referred to in 45 Cal.L.Rev. 604, 617 (1957); i.e., can it "float a Supreme Court opinion.") The "public trust" doctrine also lurks here. (See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (1970) 68 Mich.L.Rev. 473.) The possible argument that the public easement or public trust doctrines include the right of the public to use the strip of land between high and low water during periods of low water has been rejected in New York and Wisconsin (see 31 A.L.R. 960 (1924)), but remains viable (see cases and comments collected in *MacGrady, supra,* 3 Fla.St. U.L.R. at p. 615, fn. 553).

But these issues are not yet before us, and I express no opinion thereon. I mention them only to point out that they are consequential matters whose ultimate resolution will be further delayed by the majority's unwillingness at this time to meet squarely the legal issue of this case.

PARAS J.

Appendix A

THE LIMIT OF SOVEREIGN CLAIMS TO LANDS UNDERLYING NONTIDAL NAVIGABLE WATERS

State	Limit of Sovereign Claim to Bed	Authorities
Alabama	Low-water mark	*Mobile Transp. Co. v. City of Mobile* (1907) 152 Ala. 409 [44 So. 976]; *Webb v. City of Demopolis* (1892) 95 Ala. 116 [13 So. 289]
Alaska	High-water mark	Alaska Stats. § 38.05.365; *State Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984.
Arizona	Probably high-water mark	*State v. Bonelli Cattle Company* (1972) 180 Ariz. 258 [495 P.2d 1318], *rev'd on other grounds* (1973) 414 U.S. 313 [94 S.Ct. 517]
Arkansas	High-water mark	*U. S. Gypsum Co. v. Uhlhorn* (E.D.Ark. 1964) 232 F.Supp. 994; *Anderson v. Reames* (1942) 161 S.W.2d 947; *Harrison v. Fite* (8th Cir. 1906) 148 F. 781
Colorado	No policy	Declaratory relief action currently pending in federal district court in Colorado to determine who owns the bed of Grand Lake—the city, the state or the federal government
Connecticut	Low-water mark	*New York, N. H. & H. R. Co. v. Armstrong* (1918) 92 Conn. 349 [102 A. 791]
Delaware	Low-water mark	Delaware Stats. § 6151; *State ex rel. Buckson v. Pennsylvania Railroad Co.* (1969) 267 A.2d 455, *aff'd*, 273 A.2d 268 (1971)
Florida	High-water mark	Florida Stats. § 253.12; *Martin v. Busch* (1972) 93 Fla. 535 [112 So. 274]
Georgia	Low-water mark	Georgia Stats. § 85-1304; *Johnson v. State* (1902) 40 S.E. 807
Hawaii	Privately owned	Hawaii Stats. § 205-31;* *United States v. Kaiser Aetna* (D.Haw. 1976) 408 F.Supp. 42

State	Limit of Sovereign Claim to Bed	Authorities
Idaho	High-water mark	Idaho Stats. § 58-104; *Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265]; *Burrus v. Edward Rutledge Timber Co.* (1921) 34 Idaho 606 [202 P. 1067]; *Northern Pac. Ry. Co. v. Hirzel* (1916) 29 Idaho 438 [161 P. 854]
Illinois	1. *Streams and Rivers:* privately owned	*City of St. Louis v. Rutz* (1891) 138 U.S. 226 [11 S.Ct. 337]; *Trustees v. Schroll* (1887) 120 Ill. 509 [12 N.E. 243]
	2. *Meandered Lakes:* "waters edge" or low-water mark	Ill. Stats., Ch. 19, § 71; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296—"water's edge" construed to be low-water mark]; *Seaman v. Smith* (1860) 24 Ill. 521 ["water's edge" construed to be the line at which the water usually stands when free from disturbing causes]
Indiana	Low-water mark	*Irvin v. Crammond* (1915) 58 Ind.A. 540 [108 N.E. 539]; *Sherlock v. Bainbridge* (1868) 41 Ind. 35 [35 Am. Rep. 302]
Iowa	High-water mark	*Mather v. State* (1972) 200 N.W.2d 498; *Peck v. Alfred Olsen Construction Co.* (1931) 238 N.W. 416; *Barney v. Keokuk* (1876) 94 U.S. 324; *McManus v. Carmichael* (1856) 3 Iowa 1
Kansas	High-water mark	*Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031]
Kentucky	Privately owned	*Walker v. Felmont Oil Corp.* (6th Cir. 1957) 240 F.2d 912; *City of Covington v. State Tax Commission* (1929) 21 S.W.2d 1010; *Hogan v. McMurtry* (1827) 21 Ky (5 T.B. Mon.) 181
Louisiana	1. *Streams and Rivers:* low-water mark	*State v. Placid Oil Co.* (1974) 300 So.2d 154, *cert. denied* 95 S.Ct. 784, *rehrg. denied* 95 S.Ct. 1343; Op. Atty.Gen. 1938-40, p. 715
	2. *Lakes:* high-water mark	*State v. Placid Oil Co., supra;* Op.Atty.Gen. 1938-40, p. 229; Louisiana Civil Code §§ 453, 455 and 457

State	Limit of Sovereign Claim to Bed	Authorities
Maine	Low-water mark	Mass. Colonial Ordinance of 1641-47; *Brastow v. Rockport Ice Co.* (1885) 77 Me. 100; *Wood v. Kelley* (1849) 30 Me. 47
Maryland	Privately owned	Maryland Stats. §§ 9-101 *et seq.*; *Bowie v. Western Maryland R. Co.* (1918) 133 Md. 1 [104 A. 461]; *Day v. Day* (1865) 22 Md 530; *Browne v. Kennedy* (1812) 5 H & J (Md.) 195
Massachusetts	Low-water mark	Mass. Colonial Ordinance of 1641-47; *Atty. Gen. v. Revere Copper Co.* (1890) 152 Mass. 444 [25 N.E. 605]; *West Roxbury v. Stoddard* (1863) 7 Allen, 158
Michigan	1. *Great Lakes:* "waters edge"	Inland Lakes and Streams Act, Michigan Stats. §§ 11.-475(1) *et seq.*; *Hilt v. Weber* (1930) 252 Mich. 198 [233 N.W. 159]; *Ainsworth v. Munuskong etc. Club* (1909) 159 Mich. 61 [123 N.W. 802]
	2. *Other navigable waters:* privately owned	*Nedtweg v. Wallace* (1926) 237 Mich. 14 [208 N.W. 51]
Minnesota	Low-water mark	*Mitchell v. City of St. Paul* (1943) 31 N.W.2d 46; *State ex rel. Jackson County v. District Ct.* (1920) 146 Minn. 150 [178 N.W. 595]; *Snyder v. Great Northern Ry. Co.* (1914) 127 Minn. 518 [148 N.W. 617]
Mississippi	Privately owned	*Culley v. Pearl River Industrial Commission* (1959) 108 So.2d 390; *Anderson-Tully Co. v. Tingle* (1948) 166 F.2d 224; *The Steamboat Magnolia v. Marshall* (1860) 39 Miss. 109
Missouri	Low-water mark	*Conran v. Girvin* (1961) 341 S.W.2d 75; *Frank v. Goddin* (1906) 193 Mo. 390 [91 S.W. 1057]; *State ex rel. Citizens Electric Lighting & Power Co. v. Longfellow* (1902) 169 Mo. 109 [69 S.W. 374]

State	Limit of Sovereign Claim to Bed	Authorities
Montana	Low-water mark	Montana Stats. § 67-712; *United States v. Eldredge* (1940) 33 F.Supp. 337; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328]
Nebraska	Privately owned	*Nebraska v. Iowa* (1972) 406 U.S. 117; *U. S. v. Phillips* (1931) 56 F.2d 447
Nevada	Low-water mark [boundary currently disputed by state]	*Shoemaker v. Hatch* (1878) 13 Nev. 261
New Hampshire	1. *Lakes of 20 acres or more:* high-water mark	New Hampshire Stats. § 271:20; *Whitcher v. State* 87 N.H. 405 [181 A. 549]; *State v. Great Falls Mfg. Co.* (1912) 76 N.H. 373 [83 A. 126]
	2. *Rivers and Streams:* privately owned	*New Hampshire Water Resources Bd. v. Lebanon Sand & Gravel Inc.* (1967) 108 N.H. 254 [233 A.2d 828]
New Jersey	Low-water mark	*Baker v. Normanoch Association* (1957) 25 N.J. 407 [136 A.2d 645]; *Kanouse v. Stockbower* (1891) 48 N.J.E. 42 [21 A. 197]
New Mexico	No policy	New Mexico Attorney General's office has indicated that there are no navigable waters in that state
New York	Low-water mark	*Champlain & St. L. R. Co. v. Valentine* (1853) 19 Barb. (N.Y.) 484; *Canal Commissioners & Appraisers v. People* (1830) 5 Wend. (N.Y.) 447; *Ransom v. Schaeffer* (1934) 153 Misc. 199, 274 N.Y.S. 570; *Stewart v. Turney* (1921) 117 Misc. 398, 191 N.Y. Supp. 342, *rev'd on other grounds*, 197 N.Y.Supp. 81 (1922)
North Carolina	Low-water mark	*State v. Eason* (1894) 114 N.C. 787 [19 S.E. 88]
North Dakota	Low-water mark	North Dakota Stats. § 47-01-15; *Hogue v. Bourgois* (1953) 71 N.W.2d 47; *Gardner v. Green* (1937) 271 N.W. 775; *Roberts v. Taylor* (1921) 181 N.W. 622

State	Limit of Sovereign Claim to Bed	Authorities
Ohio	1. *Great Lakes:* low-water mark 2. *Other nontidal navigable waters:* privately owned	*Sloan v. Biemiller* (1878) 34 Ohio St. 492 *State ex rel. Brown v. Newport Concrete Co.* (1975) 44 Ohio App.2d 121 [336 N.E. 2d 453]; *State ex rel. Anderson v. Preston* (1963) 2 Ohio App.2d 244 [207 N.E. 2d 664]
Oklahoma	High-water mark	*State v. Nolegs* (1914) 40 Okl. 479 [139 P. 943]
Oregon	High-water mark	Oregon Stats. §§ 274.005 *et seq.*; *Brusco Towboat Co. v. State, By and Through Straub* (1977) 567 P.2d 1037; *Hume v. Rogue* (1907) 51 Or. 237 [83 P. 391]
Pennsylvania	Low-water mark	*Shaffer v. Baylor's Lake Association* (1958) 392 Pa. 493 [141 A.2d 583]; *Miller v. Lutheran Conf. & Camp Ass'n* (1938) 331 Pa. 241 [200 A. 646]; *Pursell v. Stover* (1885) 110 Pa. 43
Rhode Island	Privately owned (?)	The Rhode Island Attorney General's Office indicated that Rhode Island follows the common law test of navigability—however, that policy has never been judicially confirmed
South Carolina	Privately owned	*McDaniel v. Greenville Power Co.* (1913) 78 S.E. 980; *State v. City of Columbia* (1887) 3 S.E. 55
South Dakota	Low-water mark	So. Dakota Stats. §43-17-2; *Hillebrand v. Knapp* (1937) 65 S.D. 414 [274 N.W. 821]; *State v. Deisch* (1917) 38 S.D. 560 [162 N.W. 365]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796]
Tennessee	Low-water mark	*Hurley v. American Enka Corp.* (E.D.Tenn. 1950) 93 F.Supp. 98; *Webster v. Harris* (1902) 111 Tenn. 668 [69 S.W. 782]; *Martin v. Nance* (1859) 40 Tenn. (3 Head) 649
Texas	"Gradient Boundary"	*Heard v. Town of Refugio* (1937) 103 S.W.2d 728; *Diversion Lake Club v. Heath* (1935) 86 S.W.2d 441

State	Limit of Sovereign Claim to Bed	Authorities
Utah	High-water mark/ meander line	*Utah v. U. S.* (1971) 403 U.S. 9 [91 S.Ct. 1775—meander line]; *Provo City v. Jacobsen* (1947) 111 U. 68 [181 P.2d 213—High-water mark]; *State v. Rolio* (1927) 71 U. 91 [262 P. 987]
Vermont	Low-water mark	*Donahue v. Conant* (1929) 102 Vt. 108 [146 A. 417]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249]; *Jakeway v. Barrett* (1865) 38 Vt. 316
Virginia	Low water mark	Virginia Stats. § 62.1-2; *U.S. v. Smoot Sand & Gravel Corp.* (1957) 248 F.2d 822; *Taylor v. Commonwealth* (1904) 102 Va. 759 [47 S.E. 875]; *McDonald v. Whitehurst* (1891) 47 F. 757
Washington	High-water mark	Constit, Art. 17, § 1; *Wilbour v. Gallagher* (1969) 77 Wash.2d 306 [462 P.2d 232]; *State ex rel. Ham v. Superior Court* (1912) 70 Wash. 442 [126 P. 945]; *Van Siclen v. Muir* (1907) 46 Wash. 38 [89 P. 188]
West Virginia	Low water mark	*Carpenter v. Ohio River Sand & Gravel Corp.* (1950) 134 W.Va. 587 [60 S.E.2d 212]; *Campbell Brown & Co. v. Elkins* (1956) 93 S.E. 2d 248; *Union Sand & Gravel Co. v. Northcott* (1926) 102 W.Va. 519 [135 S.E. 589]
Wisconsin	1. *Lakes:* high-water mark	*Mayer v. Grueber* (1965) 29 Wis.2d 168 [138 N.W.2d 197]; *Doemel v. Jantz* (1923) 180 Wis. 225 [193 N.W. 393]; *Illinois Steel Co. v. Bilot* (1901) 109 Wis. 418 [84 N.W. 855]
	2. *Rivers and Streams:* privately owned	Wisc. Stats. § 30.10; *Angelo v. Railroad Commission* (1928) 217 N.W. 570
Wyoming	No policy	According to the Wyoming Attorney General's Office, there are only two "navigable" bodies of water in that state and they are both federally owned and regulated

Appendix F

Fogerty and TSR Complaint (Excerpts)

(g) Plaintiffs contend that defendants State Lands and State of California are seeking to take plaintiff owners' property and the property of the members of plaintiff TSR without just compensation having first been paid in violation of Article I, Section 19, of the California Constitution and Amendments V and XIV of the United States Constitution.

20. As a result of said actions by defendants State Lands and State of California, plaintiff owners' property has been taken and damaged and plaintiff owners' have been deprived of use and enjoyment thereof without compensation, contrary to the provisions of Article I, Section 19, of the California Constitution and Amendments V and XIV of the United States Constitution.

21. Defendants State Lands and State of California have failed to bring any action in eminent domain to acquire plaintiff owners' property waterward of the ordinary high water mark of Lake Tahoe or to compensate plaintiff owners for its damage, and have refused, and still refuse, to pay plaintiff owners just compensation or any compensation for taking and damaging said property. Moreover, defendants State Lands and State of California have refused to abandon their claim to plaintiff owners' property. Plaintiff owners will suffer great and irreparable injury unless defendants are compelled to either initiate formal condemnation proceedings and to pay just compensation into Court or else are compelled to formally abandon their claim to plaintiff owners' property.

27. The individual defendants, and each of them, have deprived plaintiff owners, and each of them, of civil rights by the aforementioned actions. Specifically, plaintiff owners have been deprived of the right to own property secure in title under state law, the right to own property as defined by law, the right to due process and just compensation when private property is appropriated for public use, and the right to the protection of valid state legislation.

28. The individual defendants, and each of them, have engaged in the aforementioned acts and made the aforementioned claims without reasonable cause or good faith belief in the validity of those claims, and have acted maliciously and oppressively, in reckless disregard of plaintiff owners' civil rights, with the intention of compelling the surrender of private property and civil rights without due process of law or just compensation.

Appendix G

TSR Answer to State's Petition to California Supreme Court (Excerpts)

FIRST AFFIRMATIVE DEFENSE

24. TSR alleges that the claims of the State of California being asserted by the Attorney General and the State Lands Commission to the property and property interests involved herein constitutes a violation of the rights of Real Parties in Interest guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 1, Article I, § 7, Article I, § 15 and Article I, § 19 of the California Constitution.

Appendix H

TSR Points and Authorities in Support of Answer to State's Petition to California Supreme Court (Excerpts)

III. THE COMMON LAW PUBLIC TRUST FOR COMMERCE, NAVIGATION AND FISHERIES (TIDELANDS TRUST) DOES NOT APPLY TO ANY PORTION OF THE SUBJECT PROPERTY LANDWARD OF THE NATURAL ORDINARY LOW WATER MARK.

Again, as in the case of the extent of State ownership of the bed of Lake Tahoe, the question as to the applicability of the so-called "tidelands trust" to Lake Tahoe has been thoroughly and extensively briefed below, and in that regard reference is made to the same memoranda of points and authorities filed in the Superior Court, both in response to the defendants' motion for partial judgment on the pleadings and plaintiffs' motion for partial summary judgment, both of which were filed jointly by TSR and the individual property owners.

However, since the last briefing in this matter, this Court has rendered a decision in *City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980) in which this Court discussed the case of *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) and its relationship to the "tidelands trust". *Illinois Central* has been cited by Petitioners for the proposition that the "tidelands trust" applies to lands underlying non-tidal waters, i.e., the bed of Lake Tahoe. Without discussing the significance of such a suggestion, nor reiterating the discussion in our earlier briefing, it is

appropriate to point out that this Court, in the *City of Berkeley* case, has placed the *Illinois Central* case in its proper slot, i.e., it is a "tidelands trust" case. In support of that conclusion is the following description by this Court:

> "There were limitations imposed by this ancient doctrine upon the alienation of tidelands to private parties. *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], was the seminal case on the scope of the public trust doctrine and remains the primary authority even today, almost nine decades after it was decided. *The decision established the principle that a state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.*" (Emphasis added) (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980).)

Just as in the case of the question of the extent of ownership of the bed of Lake Tahoe by the State, the question of the application of the "tidelands trust" to an inland non-tidal navigable body of water in California is well settled, and no useful purpose would be served in this memoranda to further repeat or reiterate that which is contained in the previous memoranda submitted to lower courts. Suffice it to say that not only does the "tidelands trust" not apply to Lake Tahoe or any other non-tidal inland navigable body of water, but there is no "public interest" need or public policy requirement that would either justify or support such a drastic change in law.

V. THE ATTEMPTS BY PETITIONERS TO OVERTURN WELL-ESTABLISHED RULES OF PROPERTY, IF SUCCESSFUL, WOULD VIOLATE RIGHTS OF REAL PARTIES IN INTEREST GUARANTEED BY THE UNITED STATES AND CALIFORNIA CONSTITUTIONS.

(A) *The Claims By The Attorney General And State Lands Commission Are Without Legal, Factual Or Historical Basis And Are Without Merit.*

As is overwhelmingly evident from all of the previous authorities and legal arguments submitted to the Superior Court, the Court of Appeal, and indeed, this Honorable Court, by Real Parties in Interest, the rulings by the Superior Court and the Court of Appeal in this action, and by the California statutes, federal and state constitutional provisions, California and federal judicial precedent, all rulings and opinions of previous California Attorneys General prior to the March 8, 1977 letter from Attorney General Younger to the State Lands Commission, all of the intraagency memoranda, interagency memoranda, legislative inquiries and comments, the actions of the Surveyor General of the State of California, and by his successors in interest, including the State Lands Commission, and by the State Lands Commission since its inception in 1941, there could exist no reasonable doubt in anyone's mind in California, including the executive, legislative and judicial branches, and any members of the private sector who were affected, that the California law was settled as to the property interests in and to the shorezones of California's inland non-tidal navigable lakes and

rivers. Indeed, it would be difficult to conceive of any issue of law in the history of the State of California which has been more often reiterated, by more government officials from all three branches of government, in connection with a "rule of property" than the property rights of the upland littoral and/or riparian owner on an inland non-tidal, navigable river or lake.

The attempt by the Attorney General and the State Lands Commission to take away vested property rights by a retroactive application of presently nonexisting law under the guise of "protecting the public interest" or serving some loosely referred to undefined environmental purpose flies in the face of constitutional guarantees under both the United States and California Constitutions, and, therefore, could not be supported constitutionally even if there was any merit to these claims.

The ever expanding scope of the claims of the Attorney General and the State Lands Commission began with the simple, but unfounded and newly proposed proposition, that the State is and has been the owner of the land between the high and the low water mark on a non-tidal, navigable body of water. It was subsequently expanded in the March 8, 1977 letter from the Attorney General to the State Lands Commission to an attempt to impose the "tidelands trust" for the first time in California to all non-tidal, inland, navigable bodies of water (which would in effect, transfer the fee title to the property involved to the State as trustee). The claim to the property interests of the shorezone owners continued with the most recent attempt in the later stages of the Superior Court proceedings, to distort

the public navigational easement in the public to use the navigable waters, wherever they might be, for various purposes as defined in that easement, to one which includes, for the first time in California, the right to use the underlying land by the public when the water recedes—which would deprive the upland owners of the universally-recognized "right to exclude others" from the dry land area involved—also a widely recognized property right which may not be taken by the government without the payment of just compensation. (See, *Kaiser-Aetna v. United States*, 444 U.S. ....., 100 S.Ct. 383 (1979).)

And finally, in what may be hoped to be the last effort to capture some portion of the property interests, without payment for the vested rights involved, and to thus seemingly salvage some part of this inglorious and unconstitutional campaign from total failure, the Petitioners now claim that the littoral owner has no right to construct piers, docks, or wharfs in the area being claimed by the State, even if there is no state fee ownership, tidelands trust, or expanded public navigational easement. The only authority cited to support this last desperate and unconstitutional, albeit novel, contention is *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P2d 232 (1969). The Court is asked to lend its assistance to "enforcing" this latest claim by requiring the removal of all docks, piers and wharves from the shorezone. Suffice it for now to say that the *Wilbour* case involved the placing of fill in a lake, and the holding of the case is remarkably different from that ascribed to it by Petitioners, (see Petition, p. 61-62) and significantly Washington state does not recognize riparian or littoral rights in the upland

owner. (*Harris v. Aylebos Industries, Inc.* 505 P2d 457 (1973). Also see, *Port of Seattle v. Wash. R.R.*, 255 U.S. 56 (1921).)

(B) ***Petitioner's Claims Are In Conflict With The Fifth And Fourteenth Amendments To The United States Constitution And Article I, §§ 1, 7a And 19 Of The California Constitution Which Protect Private Property Rights From Arbitrary "State" Action Whether Acting Through Its Executive, Legislative Or Judicial Branch.***

The application of the protection of the Fourteenth and Fifth Amendments to actions of a state whether acting through its *executive,* legislative or judicial branch, is well established. (See *Chicago, Burlington etc. R'D v. Chicago,* 166 U.S. 226 (1897); *Scott v. McNeal,* 154 U.S. 34 (1894); *Hughes v. Washington,* 389 U.S. 290 (1967).)

Additionally, the claims by Petitioners to the property rights of Real Parties in Interest herein not only violates the constitutional rights protected by the Fifth and Fourteenth Amendments to the United States Constitution, but likewise violates Article I, § 7a, of the California Constitution which provides in part:

> ". . . No person shall be . . . deprived of . . . property without due process of law. . . ."

Article I, § 19, of the California Constitution provides:

> "Private property may be taken or damaged for public use only when just compensation ascertained by jury unless waived, has first been paid to, or into court for, the owner."

Petitioners' claims are likewise contrary to the provisions of Article I, § 1, of the California Constitution, which declares:

> "All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty; *acquiring, possessing, and protecting property; and pursuing and obtaining* safety, happiness, and *privacy.*" (Emphasis added.)

(C) ***The Critical Importance Of Upholding Well-Established Law Governing Property Ownership Has Been Uniformly Recognized By Both The California Supreme Court And The United States Supreme Court Which Have Protected Such Rights From Radical Departures From Existing Law.***

In holding that a zoning ordinance, on its face, had not deprived the landowner of "substantially all reasonable use of his property" this Court, in the recent case of *Agins v. City of Tiburon,* 24 Cal.3d 266, 277 (1979), upheld the ordinance against the challenge that it violated the constitutional rights of the owners. (Affd. by U.S. Supreme Court, June 10, 1980.)

In affirming this Court, the unanimous Supreme Court discussed the tests to be applied in determining whether a government's action violates constitutional rights:

> "Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States v. Causby,* 328 U.S. 256, 262, and n7 (1946), *nor extinguish a fundamental attribute of ownership,* see *Kaiser-Aetna v. United States,* 444 U.S. at ....., 100 S.Ct. 383 . . ." (Emphasis added) [*Kaiser-Aetna* involved the "right to exclude others"

> from one's property.] . . . Thus, it cannot be said that the impact of general land use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments. See *Penn. Central Trans Co. v. New York City,* 438 U.S. at 124." (*Agins v. Tiburon,* 40 CCH S.Ct. Bull. 2864, 2871.)

This present California Supreme Court has also recently discussed the critical importance, in a constitutional government of laws, of the application of the doctrine of stare decisis especially as related to the upholding of a long standing "rule of property." At page 532 of the case of *City of Berkeley v. Superior Court,* 26 Cal.3d 515, this Court quoted with approval the following statement from the case of *Abbott v. City of Los Angeles,* 50 Cal.2d 438 (1958), wherein it was recognized.

> ". . . [D]ecisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. . . ."

In *Agins,* further demonstrating this Court's strong support for the protection of rights guaranteed by the Fifth and Fourteenth Amendments, not only to the criminally accused but in connection with the preservation and protection of private property rights, Justice Richardson, writing for the majority, reiterated:

> "There is a clear, direct and unquestionable constitutional basis for the protection of private property. Amendment V of the United States Constitution pro-

vides that 'No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.' In concert with the foregoing Fifth Amendment language article 1, section 19, of the California Constitution mandates that 'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner.' (*Agins v. City of Tiburon,* 24 Cal.3d 266, 273 (1979).)

• • •

"While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment." (*Agins v. City of Tiburon,* 24 Cal.3d 266, 273-274 (1979).)

In discussing the importance of protecting existing property rights from arbitrary government action and the source of those rights, the United States Supreme Court has observed:

". . . It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined . . ."

"Property interests, of course, are not created by the Constitution. Rather, they are created and their

dimensions are defined by existing rules or understandings that stem from an independent source such as state law—. . ." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)

And from the case of *Boddie v. Connecticut,* 401 U.S. 371, 375 (1971):

"Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just."

The claims by the Attorney General and the State Lands Commission and the attempts to overturn the well established law in this matter, for whatever reason, strikes at the very fundamental basis of private property ownership and thus, the following observations and admonitions by the United States Supreme Court are significant:

". . . [N]o class of law is more universally sanctioned by the practice of nations and the consent of mankind, than laws which give peace and confidence to the actual possession and tiller of the soil." (*Hawkins v. Barney,* 30 U.S. (5 Pet.) 457, 466 (1831).)

". . . the general welfare of society is involved in the security of the titles to real estate. . . ." (*American Land Co. v. Zeiss,* 219 U.S. 47, 60 (1911).)

"[n]othing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed where the enjoyment of its fruits

is uncertain." (*Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78 (1831).)

Although not precisely in point, the observation of Justice Oliver Wendell Holmes in the famous *Pennsylvania Coal* case (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)) seems particularly appropriate as related to the claims of the Attorney General and the State Lands Commission. Justice Holmes warned:

> ". . . [T]he natural tendency of human nature is to extend the [police power] qualification more and more until at last private property disappears." (*Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

In addition to the California Constitution's pointed recognition of the particular significance that private property rights occupy in the scheme of things in this state and the recent pronouncements by this Court, two quotations from older California cases are worth noting as echoing the views of the United States Supreme Court quoted above:

> ". . . wherever the right to own property is recognized in a free government, practically all of the rights become worthless if the government possesses an uncontrollable power over the property of the citizen." (*House v. L.A. County Flood Control Dist.*, 25 Cal.2d 384, 391 (1944).)

> "In the interest of justice the property rights of individuals should be carefully guarded. Governments are intended primarily to protect the rights of their individual citizens. The equitable and well established doctrine of eminent domain should not be invaded in the guise of the exercise of police powers so as to

deprive individuals of their property rights without just compensation. Neither the Constitution nor the laws of California are intended for any such unjust purpose." (*City of Los Angeles v. Aitken*, 10 Cal.App. 2d 460, 468 (1935).)

In a 1979 case involving a constitutional challenge to a regulation of the California Coastal Commission which was alleged to destroy a vested right, certain observations by the Court are relevant to the instant case:

> "The right possessed by Pardee was in the nature of a property right. Such a right is rooted in the Constitution. (*Miller v. McKenna*, 23 Cal.2d 774, 783 [147 P.2d 531].) Pardee's failure to exercise that vested right to its fullest extent before the enactment of the 1976 Coastal Act does not affect its *vested* character." (16 Am.Jur.2d, Constitutional Law, § 422, p. 762.) (Emphasis added.)
>
> "As was said in *Estate of Thramm*, 80 Cal.App.2d 756, 765 [183 P.2d 97]: '[T]he Legislature is without power to impair or destroy the obligations of contractual or vested rights, and any statute which affects a vested right cannot be given retrospective operation.' The statute here could not operate to terminate a right which existed under the law prior to its passage. (*McKinney v. Ruderman*, 203 Cal.App.2d 109, 117 [21 Cal.Rptr. 263].)
>
> "If the Legislature is without authority to retroactively deprive Pardee of a vested right, a fortiori the State Commission, by its regulation, was without authority to do so." (*Pardee Construction Co. v. California Coastal Com.*, 95 Cal.App.3d 471, 479-480 (1979).)

The above authorities establish, without doubt, that a State cannot constitutionally destroy vested property rights whether they have been created by legislation, judicial precedent or even if created by long standing tradition and practice. Since a legislature cannot constitutionally deprive one of a vested property right without compensation, and whereas a court cannot constitutionally deprive one of a vested property right, there certainly can be no question that the executive branch of government is likewise constitutionally restricted in its conduct.

(D) *In Cases Similar On Their Facts To The Instant Case, Federal Courts, Supported By United States Supreme Court Precedent, Have Recently Overturned State Supreme Court Decisions Which Constituted Radical Departures From Existing State Laws Concerning Property Rights.*

The application of the constitutional principles and proscriptions discussed generally above are perhaps no more graphically and forcefully demonstrated than in two cases involving the reversal of the Hawaiian Supreme Court, based on its violation of constitutional rights of property owners, by the Federal District Court for Hawaii.

The two cases referred to in the preceding paragraph, came out of the United States District Court for Hawaii and reviewed decisions by the Hawaiian Supreme Court that had precisely the same effect as would the claims of the Attorney General and the State Lands Commission in this case if they were upheld by this Court. The federal court held that the decisions of the Hawaiian Supreme Court had violated the owners' rights under the Four-

teenth Amendment. The first case in point of time, is *Robinson v. Ariyoshi,* 441 F.Supp. 559 (1977). The more recent case is *Sotomura v. County of Hawaii,* 460 F.Supp. 473, decided in 1978.

In *Robinson,* the Hawaiian Supreme Court had reversed what had always been accepted as well established Hawaiian law relating to riparian rights. The Federal Court pointed out that:

> "For over a century neither the State nor its predecessors in title ever attempted to take water rights without either purchase or condemnation but [the court in] *McBryde I* took the plaintiffs' water rights for the State 'by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. . . . [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its Legislature, and no less when a taking is unintended than when it is deliberate. . . .' *Hughes,* 389 U.S. at 298, 88 S.Ct. a 443." (*Robinson v. Ariyoshi,* 441 F.Supp. 559, 585 (1977).)

And in a statement that is remarkably applicable to the claims of the Attorney General and the State Lands Commission, the Court added:

> "This retroactive taking of private property for and by the State, without payment therefore, [sic] was clearly the result of 'perverse reading of prior law' as inferentially condemned in *O'Neil v. Northern Colorado Irrigation Co.,* 242 U.S. 20, 26, 36 S.Ct. 7, 61 L.Ed. 123 (1916), and in contravention of the principles laid down in *Muhlker v. New York & Harlem R.R.,* 197 U.S. 544, 25 S.Ct. 522, 49 L.Ed. 872

(1905). Even though the Court may have been motivated to act because the justices thought it was for the best interests of Hawaii that surplus water be publicly owned and that the rivers should flow, undiminished, to the sea, the court could not and cannot take away the private property of the plaintiffs without paying them for it. The Fourteenth Amendment so commands." (*Robinson v. Ariyoshi*, 441 F.Supp. 559, 585-586 (1977).)

Not only is the *Sotomura* case also in point insofar as the law is concerned, it is also factually similar since it involved the question as to the location of the boundary line between state and private ownership on the seashore in Hawaii. The case arose out of an eminent domain action commenced by the County of Hawaii to acquire certain seashore land from a private owner for public use as a beach park. The state trial court had awarded One Dollar damage for the property located between the line of mean high tide and the debris line and had established a zone of valuation landward of the debris line up to what was termed the "vegetation line" and in addition to an award for the property that lay landward of the vegetation line, the trial court awarded a substantial sum for the property between the vegetation line and the debris line. (The law in Hawaii, as is probably true in every other seacoast jurisdiction, recognized title in the upland littoral owner down to the line of mean high tide. Hawaii has a system of land registration and the boundaries of this particular land had been fixed, ". . . with the approval of the state surveyor, by decree of the land court." (*Sotomura v. County of Hawaii*, 460 F.Supp. 473, 475 (1978). That line was established as the "high water mark" and was generally fixed along the

seaweed line. (*Id.* at p. 475) The seaweed line "was at an elevation just above mean high tide". (*Id.* at p. 478) An earlier Hawaiian Supreme Court case had suggested that in locating the "seaward boundary of unregistered land" that the "upper reaches of the wash of the waves as evidenced by the line of debris on the shore" should be used. (*Id.* at p. 475).)

The Hawaii Supreme Court in *Sotomura* ". . . decreed that all of the Owners' property seaward of the vegetation line belonged to the public." (*Id.* at p. 477) In pointing out the abrupt departure from existing law that this decree represented, the Federal District Court observed:

> "At the time the Hawaii Supreme Court announced its decision in *Sotomura,* all relevant precedent except *Ashford, supra,* hereinbelow discussed, demonstrated that high water mark was to be determined by reference to the tides and that mean high water—that is, the average elevation of all of the high tides over a long period of time—was the accepted criterion. The relevant precedent included rulings of the land court in cases of both initial registration and registration of accretion to already registered property and the Hawaii Supreme Court's implicit acceptance of that elevation, known to be approximately 0.8 feet above mean sea level in this jurisdiction in *Klausmeyer v. Makaha V.F., Ltd. et als.,* 41 Haw. 287 (1956). It also included the Attorney General's opinions previously mentioned as well as earlier opinions referring to 'mean high water mark' as an ownership and jurisdictional limit along the shore. The Hawaii Legislature itself recognized as early as 1928, and continued to recognize as late as 1964, that 'mean high water mark' is the line of division between private and public prop-

> erty along Waikiki Beach. For many years, the Legislature was aware that public land beneath 'tidal waters' abutted private owners on the upland." (*Sotomura v. County of Hawaii*, 460 F.Supp. 473, 478 (1978).) (footnotes omitted)

And in perhaps the most significant language by the Federal District Court insofar as the claims by the Petitioners herein are concerned, the Court stated:

> "The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it. *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Robinson v. Ariyoshi, supra.*" (*Sotomura v. County of Hawaii*, 460 F.Supp. 473, 481 (1978).)

A leading case that has been cited heretofore in this matter was likewise succinctly and accurately discussed by the Federal District Court in *Sotomura* as follows:

> "The situation here is similar to one occurring several years ago in the State of Washington. Through a new construction of the state constitution, the Washington Supreme Court had ruled that title to accretion upon oceanfront land vested in the State rather than in the abutting landowner. This thus deprived the abutting owner of a substantial amount of beachfront property to which he held title under pre-existing state law. On appeal to the United States Supreme Court, the Court reversed the state court's ruling,

finding that federal law, and not state law, was controlling. *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967). In a concurring opinion, Mr. Justice Stewart asserted that if state law applied, the decision effected an unconstitutional taking. Commenting upon the abrupt change in state law, not foreshadowed by, and unpredictable in view of, existing precedent, Mr. Justice Stewart wrote:

> 'There can be little doubt about the impact of that change upon Mrs. Hughes: the beach she had every reason to regard as hers was declared by the state court to be in the public domain. . . . Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its Legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.' (389 U.S. at 297-98, 88 S.Ct. at 443.)" [Note: *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) subsequently decided that questions regarding the ownership of land which, at the time of the state's admission to the Union, underlaid a navigable river should be decided by state law rather than by federal law.] (*Sotomura v. County of Hawaii*, 460 F. Supp. 473, 481 (1978).)

In what was denominated as "conclusions" the federal district court in *Sotomura* held:

> "The Hawaii Supreme Court's retroactive application of the *Ashford* standards to locate the sea-

> ward boundary of property at the vegetation line, following erosion, ignoring vested property rights and without determining the extent of actual erosion, *was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution.*" (Emphasis added) (*Sotomura v. County of Hawaii,* 460 F.Supp. 473, 482-83 (1978).)

Among other relief granted to the owners, the federal court permanently restrained the government officials "from claiming ownership or exercising possession or control of any portion of [the property involved] for which compensation has not been paid in accordance with this decision." (*Sotomura v. County of Hawaii,* 460 F.Supp. 473, 483 (1978).)

Hughes v. Washington, 389 U.S. 290 (1967) involved a change in the interpretation of the Washington Constitution the effect of which was to deprive owners of existing, vested rights in accretion along the coastline of Washington and the language of Justice Stewart in the concurring opinion is equally applicable to the situation in the instant case as noted by the Federal District Court in the *Sotomura* case. (See also, *Ettor v. Tacoma,* 228 U.S. 148, 156 (1913) holding that once a state-conferred right to compensation has actually vested or accrued, a state statute conferring such benefits may not be repealed without violating the Due Process provisions of the United States Constitution as to the holder of the vested right.)

TSR vigorously urges and respectfully submits that even if there was some substance of support in either practice, custom or statutory, constitutional or case law for the propositions being advanced by Petitioners, such a radical departure from the existing well recognized law in California would constitute a violation of both the federal and state Constitutions, and therefore, the contentions of Real Parties in Interest, as to the extent of their ownership interests, under existing law, must be upheld.

(C) *In The Recent City Of Berkeley Case This Court Implicitly Applied Considerations Of Equitable Estoppel To Prevent Injustice.*

Because of the detailed and comprehensive analysis of the several leading California cases prior to *Mansell* that involved the doctrine of equitable estoppel, and the lengthy treatment of the doctrine by this Court in the *Mansell* case, and the treatment of the question in other briefs and points and authorities now before this Court as a part of the total record in both the instant case and the *Lyon* case, further discussion of other California cases would appear to be redundant. However, a brief reference to *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892) and *City of Berkeley v. Superior Court,* 26 Cal.3d 515 (1980) would appear to be in order because both cases implicitly recognized at least a limited application of the doctrine of equitable estoppel to the facts of those cases. Again, the cases are not authority on the question on ownership in the instant case since the lands involved in both cases involved the "tidelands trust". This Court recognized that *Illinois Central*

was a "tidelands trust" case on page 521 of the decision, wherein it stated:

> "The decision established the principle, that a state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties." (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980).)

In *City of Berkeley*, this Court, in a split decision, in upholding the continuation of the long recognized tidelands trust cited *Illinois Central* with approval in observing that even in connection with the upholding of the tidelands trust ". . . any improvements made on such lands could not be appropriated by the state without compensation. . . .". (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 534 (1980).)

In *City of Berkeley*, this Court likewise recognized equitable principles when it ruled that:

> "Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action. Tidelands that have been neither filled nor improved are not only the most suitable for the continued exercise of trust uses, but because there is only a remote likelihood that these parcels may be filled [citing cases] the economic loss to the grantees of such lots is speculative at best and is clearly outweighed by the interests of the public." (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 534-535 (1980).)

This Court further pointed out in a footnote in the *City of Berkeley* case that:

> "A number of cases hold or state that the reclamation of tidelands subject to the public trust does not, without more, terminate the trust. (E.g., *Marks v. Whitney, supra,* 6 Cal.3d 251, 261; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P2d 20].) . . ." (f.n. 19, p. 535.)

However, in perhaps the most significant statement by this Court relating to the equitable principles involved, the Court implicitly, but without specifically saying so, applies the doctrine of equitable estoppel. This statement immediately follows the earlier one on the virtual indestructibility of the tidelands trust ascribed to it by the majority of this Court, and points out the bases for protecting the private property interests involved:

> "But these cases did not involve the interests of landowners who had reclaimed tidelands in reliance upon decisions that were subsequently overruled." (*Id.* at 535.)

Likewise, in the application of the tidelands trust to the "inland sea" that constitutes Lake Michigan, the United States Supreme Court ruled that the docks, piers and wharves which had been constructed on some of the areas that the Court held were subject to the "tidelands trust" could be removed only "beyond the point of practicable navigability" and directed the court below:

> ". . . to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section ten, extend into the lake beyond the point of practical navigability, having reference to the manner in which

> commerce in vessels is conducted on the lake; and, if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; . . ." (*Illinois Central Railroad v. Illinois,* 146 U.S. 387, 464 (1892).)

Supportive of the statement in *City of Berkeley* that "any improvements made on such lands [tidelands] could not be appropriated by the state without compensation", is the following admonition by the *Illinois Central* Court:

> "Undoubtedly there may be expenses incurred in improvements made under such a grant [the subsequently repealed Illinois legislation granting one of the most active commercial ports in the United States at that time to the Illinois Central Railroad] which the State ought to pay; . . ." (*Illinois Central Railroad v. Illinois,* 146 U.S. 387, 455 (1892).)

At page 454 of *Illinois Central,* the Court describes the extent, magnitude and navigational and commercial significance of the property granted to the Illinois Central Railroad by the Illinois State Legislature, (and by reasonable inference the extent of improvements for which the "State ought to pay" if removed) as follows:

> "The area of the submerged lands proposed to be ceded by the Act in question to the railroad company embraces something more than a thousand acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor, but embracing adjoining submerged lands which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the

merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the Port of Marseilles, and nearly if not quite equal to the pier area along the waterfront of the City of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly twenty-five percent of the lake carrying trade as compared with the arrivals and clearings of all the leading ports of our great inland seas." (*Illinois Central Railroad v. Illinois*, 146 U.S. 387, 454 (1892).)

Appendix I

TSR Petition for Rehearing (Excerpts)

THE COURT'S DECISION IMPOSING THE "TIDELANDS TRUST" ON THE SHOREZONE OF LAKE TAHOE IS A RADICAL DEPARTURE FROM CALIFORNIA LAW; VIOLATES A WELL ESTABLISHED RULE OF PROPERTY; AND CONSTITUTES A "TAKING" IN VIOLATION OF THE UNITED STATES CONSTITUTION

It is well established in California law that upon the admission of California to the Union in 1850 the State succeeded to title up to the mean high tideline along the Pacific Ocean shoreline. This is evidenced by many statutes, constitutional provisions and judicial decisions. It is likewise well established California law that a grant of *tideland* property, unless the grant be for tideland purposes, does not extinguish the "tidelands trust," but that the grantee generally takes the tidelands subject to that trust. However, (as the majority of this Court implicitly concedes) the "tidelands trust" has never been applied to the navigable inland rivers and lakes (the non-tidal waters) of California.

The holding on page 29 of the Lyon opinion demonstrates the Court's recognition that for the first time in California history or practice or law, the "tidelands trust" is to be applied to non-tidal, navigable lakes and rivers:

> ". . . We hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water."

The nature and extent of the "tidelands trust" is described on page 21 of the Lyon opinion:

> ". . . [T]idelands are owned by the state in trust for the public, for their use for commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state."

It seems reasonable to assume that if fee title to land located on the shoreline of the non-tidal, navigable lakes and rivers of California carried the burden of a "tidelands trust" of the dimensions described, i.e., commerce, navigation and fishing, all recreational uses and the right of preserving the property in its natural state, this fact would have come to light in the one one hundred thirty years of California's statehood. To assert, in effect, that the application of the "tidelands trust" only to tidelands, (which until this decision was unquestioned) does not constitute a "rule of property," is an incredibly inaccurate conclusion. (See p. 30 of Lyon's opinion.) To suggest that the failure to verbalize the inapplicability to the inland waters takes the situation out of the "rule of property" category is absurd. Such a determination would result in the illogical proposition that the more settled a point of law relating to property rights, the less likely it is to constitute a "rule of property."

A more accurate statement of the rule of property involved would be: the ownership in fee of real property carries with it all of the attributes of ownership. A judicially declared "tidelands trust" imposed one hundred and thirty years after the title is created would take from those rights and would violate the "rule of property."

In its attempt to provide some judicial logic for the destruction of this "rule of property" by the imposition of the "tidelands trust" on inland navigable lakes and rivers, the majority of this Court likewise changed the English common law applicable to the inland navigable rivers and lakes, and in effect, overruled the California Supreme Court case of *Wright v. Seymour* 69 Cal. 122 (1886) which had confirmed that California indeed had adopted the common law of England as contended for by the respondents in this case. This Court refashioned the California law of 1850, and after, in order to be able to state that the State acquired ownership of the bed of navigable lakes and rivers up to the high water mark at the time of admission to the Union. It is only through such retroactive construction of common law that the State would have held title to property to which the "tidelands trust" could have theoretically attached. That is to say that if California did not own the title to the bed of non-tidal, navigable inland lakes and rivers up to the high water mark at the time of admission into the Union, the very necessary first step in this judicial creation would have been missing.

The English common law in 1850 was clear, as is seemingly admitted by this Court's majority on page 8, and that is, that the sovereign simply did not hold title to the beds of non-tidal inland navigable rivers and lakes. ("Nontidal rivers and lakes were privately owned;"—see Lyon Opinion, p. 8.)

California had adopted the common law in 1850 by statute which provided in part:

> "[the] Common Law of England shall be the rule of decision in all Courts of this State." (Stats. 1850, ch. 95, p. 219.)

The recognition by the California Supreme Court in 1886 that section 830 of the Civil Code, enacted in 1872, is a "declaration of the law . . . as it has existed since the formation of our government" makes it clear that the property of public ownership on a non-tidal, navigable lake, such as Lake Tahoe, extended no higher than the natural low water mark, whether section 830 be considered as a "grant" to the upland owner or the first "claim" to ownership of any part of the bed of the lake, the option provided to the states by the holding of *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

In any event, none of the theories (i.e., under English common law the state held no title to the bed of the lake at all; or the first claim of title by the state was the enactment of Civil Code section 830 in 1872 which claimed the bed only up to the natural low water mark, or that Civil Code section 830 was a grant) supports the attachment of the "tidelands trust" to property *above* the natural low water mark since the state never had title to that property!

Consequently, while it is patently clear and admitted by this Court that the "tidelands trust" had never, before this decision, been considered by anyone, including any previous California or federal court, to apply to non-tidal navigable lakes and rivers—it could not apply above the natural low water mark as it existed in 1850. This fact requires reversal!

The many other reasons that compel the conclusion that the "tidelands trust" has no reasonable or logical application outside of its historic application to the "tidelands" have been presented to this Court previously in the points and authorities of all of the private interests and will not be repeated here.

The fact that this Court has radically departed from existing California property law in holding, for the first time in California law, practice or custom, that the "tidelands trust" applies to non-tidal navigable lakes and rivers is, in and of itself, a violation of the constitutional rights of the owners and the decision must, for that reason alone, be reversed.

THE COURT'S DECISION IN THIS CASE AND LYON AMOUNTS TO CONFISCATION AND IS IMPERMISSIBLE CONSTITUTIONALLY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

TSR, in presenting the position of its Lake Tahoe owner-members, in its points and authorities in support of return to alternative writ of mandamus, filed on July 7, 1980, devoted a number of pages to a discussion of the constitutional guarantees that are involved in this case (i.e., pages 29 through 48). The complete citation of authority and discussion will not be repeated here, but the Court is respectfully directed to that material, since the characterization of the "claims" of the State Lands Commission and the Attorney General and the application of constitutional law to those claims now applies to the decision of this Court by its adoption of every claim made by the "People."

The attempted deprivation of constitutionally protected property rights by the executive branch has now been replaced by a constitutionally impermissible "confiscation" of those same rights by the judicial branch.

As was said at page 29 of those points and authorities:

> "The application of the protection of the Fourteenth and Fifth Amendments to actions of a state whether acting through it *executive*, legislative or judicial branch, is well established. (See *Chicago, Burlington etc. R'D v. Chicago*, 166 U.S. 226 (1897); *Scott v. McNeal*, 154 U.S. 34 (1894); *Hughes v. Washington*, 389 U.S. 290 (1967).)"

The importance of protecting basic constitutional rights of property was discussed by the United States Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 at 577 (1972):

> ". . . It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily underminded . . ."

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law— . . ."

This Court, as recently as *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, at page 532, recognized the same general proposition in quoting with approval from the case of *Abbott v. City of Los Angeles*, 50 Cal.2d 438 (1958):

". . . [The] decisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. . . ."

Emphasizing the constitutional importance of the concept of private property ownership, it was said:

". . . wherever the right to own property is recognized in a free government, practically all of the rights become worthless if the government possesses an uncontrollable power over the property of the citizen." (*House v. L.A. County Flood Control Dist.*, 25 Cal.2d 384, 391 (1944).)

The constitutional protection provided to private property rights was recognized in the case of *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460, at page 468, (1935):

"In the interest of justice the property rights of individuals should be carefully guarded. Governments are intended primarily to protect the rights of their individual citizens. The equitable and well established doctrine of eminent domain should not be invaded in the guise of the exercise of police power so as to deprive individuals of their property rights without just compensation. Neither the Constitution nor the laws of California are intended for any such unjust purpose."

And as Justice Richardson, writing for the majority in *Agins v. City of Tiburon* (1979) 2[illegible] Cal.3d 266, observed at pages 273-274:

> "While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. *These rights are protected by the same amendment.*" (Emphasis added.)

Based on long-standing, historic and well established constitutional law, continually recognized by both the United States Supreme Court and the California Supreme Court, there is absolutely no question that this Court, in this decision, if it is allowed to stand, has deprived the lakefront owners at Lake Tahoe of valuable, significant and constitutionally protected property rights. One of the basic rights destroyed by this decision (and held to be entitled to constitutional protection), has recently been described by the United States Supreme Court as the "right to exclude, so universally held to be a fundamental element of the property right, . . ." (*Kaiser-Aetna v. United States* (1979) 444 U.S. 164 at p. 179.)

See also, *International News Serv. v. Associated Press* (1918) 248 U.S. 215, 250, where Justice Brandeis states:

> "An essential element of individual property is the legal right to exclude others from enjoying it."

What the Washington State Legislature attempted to do to Mrs. Hughes' property rights on the coastline of Washington (as described in *Hughes v. Washington* (1967) 389

U.S. 290) is remarkably similar to the impact and effect of this Court's decision on the property rights of all Lake Tahoe lakeshore owners. In an often quoted concurring opinion by Mr. Justice Stewart, the factual similarity appears and the constitutional protections are emphasized:

> "There can be little doubt about the impact of that change upon Mrs. Hughes: the beach she had every reason to regard as hers was declared by the state court to be in the public domain. . . . Although the State in this case made no attempt to take the accreted land by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. *Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its Legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.*" (*Hughes v. Washington*, 389 U.S. 290 (1967) at pp. 297-298.) (Emphasis added.)

This Court's attention is again directed to two Federal District Court cases from the Federal District of Hawaii, now pending in the Ninth Circuit Court of Appeals, which were earlier referred to in the points and authorities filed with this Court by TSR. (See pp. 39 through 47.) The cases are *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (1978) and *Robinson v. Ariyoshi*, 441 F.Supp. 559 (1977). Both of these cases were reversals of Hawaiian Supreme Court decisions by two different Federal District Court judges. The Hawaii state court had likewise embarked upon a radical and abrupt departure from existing

Hawaiian law which the Federal District Court held to be violative of the constitutional rights of the owners.

One of the cases involved the "confiscation" of beach frontage by the court and the other involved the "confiscation" of riparian rights. The factual situations are virtually identical. The analyses of the constitutional principles are directly applicable to this Court's decision.

The most recent case from the United States Supreme Court, which involved the question of the application of the Fifth Amendment's requirement that private property shall not "be taken for public use, without just compensation," is *San Diego Gas & Electric Co. v. San Diego,* No. 79-678, decided on March 24, 1981, in which it was alleged that property had been "taken" by a regulatory ordinance in violation of the Fifth Amendment. By a five to four vote the Court concluded that it lacked jurisdiction because of the lack of finality of the state court proceedings and, consequently, the appeal was dismissed.

Justice Rehnquist joined with the majority in the jurisdictional determination, but concluded that he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan," relating to the "federal constitutional aspects" of the case.

Justice Rehnquist's approval of the dissent's discussion of the constitutional aspects of the case, gives great constitutional and precedential effect to that opinion. It is therefore particularly significant that at page 17 of the slip opinion, in the dissent, Justice Brennan quotes with approval from the case of *Hughes v. Washington, supra,* as follows:

". . . But 'the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.' Hughes v. Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring, (emphasis in original).); . . ."

". . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property."

Justice Brennan likewise reasserted the continued vitality and validity of *Kaiser-Aetna, supra,* when he observed:

". . . the Court frequently has found 'taking' outside the context of formal condemnation proceedings or transfer of fee simple, in cases where government action benefitting the public resulted in destruction of the use and enjoyment of private property. E.g., *Kaiser-Aetna v. United States, supra,* 444 U.S. at 178-180 (navigational servitude allowing public right of access); . . ." (Slip Opinion, dissent, p. 16.)

Justice Brennan continues, at page 17:

". . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property." (Citing *United States v. Dickinson, supra,* 331 U.S. at 748; *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945).)

Further discussing the constitutional restraints applicable to all three branches of government, Justice Brennan emphasizes that if the offending regulation "is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use' . . . the landowner may nevertheless have a damage cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment Due Process violation." (Slip Opinion, dissent, fn. 23, p. 21.)

In effectively eliminating the only announced basis for this Court's decision in this case, i.e., a "policy judgment" by the "judicial branch" and in emphasizing the overriding constitutional considerations that this Court has ignored in its decision in the instant case, Justice Brennan proclaimed what should be a self-evident truth that must be preserved if constitutional provisions are to continue to have meaningful application to the protection of private property rights:

> "... But the applicability of expressed constitutional guarantees is not a matter to be determined on the basis of *policy judgments* made by the legislative, executive, or *judicial* branches. Nor can the vindication of those rights depend on the expense in doing so." (Slip Opinion, dissent, p. 25.) (Emphasis added.)

Appendix J

City of Los Angeles v. Venice Peninsula Properties. Excerpts from appellate court decision currently pending before California Supreme Court. (Excerpts)

City of Los Angeles v. Venice Peninsula Properties, 117 Cal.App.3d 335 (1981) Hearing granted May 21, 1981.

The appellate court opinion reads, in part:

At issue on this appeal is whether, by virtue of the so-called California Tidelands Trust Doctrine, the State of California (State) and its succesor in interest, the City of Los Angeles (City) can assert an easement for commerce, navigation and fishery over land which was part of a Mexican land grant and patented by the United States government pursuant to the Act of 1851. We hold that neither the State nor the City possess such an easement over the property in question here. (Footnote omitted).

. . . .

The first attempt to establish a public easement over the property did not occur until 1965, when the City filed the instant action for declaratory relief and to quiet title. By virtue of said easement, the City asserts the right to dredge, construct sea walls, and to make improvements in the Lagoon without the necessity of exercising the power of eminent domain.

. . . .

The State concedes that the property owners have valid fee title to lots C and R, but that such title is subject to the public trust easement because they were tidelands or submerged lands prior to the original grant. (Footnote omitted).

Although only lots C and R are involved in the instant litigation, the State asserts that the entire Lagoon, as it existed at the time of the grant, was and still is subject to the public trust easement. Thus, according to the State, even those areas which are now dry land and developed would be so burdened.

. . . [The property owners] contend that the recognition of the existence of the public trust easement directly affects the title to such property and its exercise in the manner in which the State proposes here would render the naked fee title valueless and would amount to inverse condemnation.

The so-called Tidelands Public Trust Doctrine is a creature of United States and California law and is an incident of sovereign title in tideland property.

"The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, at p. 453 [36 L.Ed. 1018, at p. 1042, 12 S.Ct. 110]. . . .

. . . .

It is difficult for us to see how the patent can be described as settling in the grantee a full and *complete* title, while at the same time holding that it was burdened by a servitude of the magnitude of that asserted by the State in this action.

Inasmuch as California never acquired sovereign title to land which was the subject of a prior grant by the Mexican government, the public trust easement, which is an

adjunct of sovereignty and a creature of United States and California law, never arose.

. . . .

We conclude that the State does not have a public trust easement for commerce, fishing and navigation in the Lagoon, since it never had sovereign title to the property. *City of Los Angeles v. Venice Peninsula Properties,* 117 Cal.App.3d 335, 338-347. The dissent reads in part:

In my opinion a public trust easement for navigation, commerce, and fishery has existed since 1839 and continues to exist in the property identified as Ballona Lagoon, for the reason that throughout this period it has been tidewater property. A public trust easement attaches to all tidewater and tideland property, and the rule is the same under Mexican law (*Lux v. Haggin* (1886) 69 Cal. 255, 316, 317 [4 P. 919]), United States law (*Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, 455-460 [36 L.Ed. 1018, 1043-1045, 13 S.Ct. 110]), and California law (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521 [162 Cal.Rptr. 327, 606 P.2d 362]; *Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374]).

. . . .

The disputed issue is whether a public trust easement in tidal property can exist when full title to a Mexican land grant has been confirmed in private ownership. Appellants assert that confirmation of the grant gave them title without limitation and reservation. . . .

I see nothing inconsistent in recognition of fee title in Mexican-land-grant tidal property and recognition of a public trust easement in the same property (*Lewis Blue*

Point Oyster Co. v. Briggs (1913) 229 U.S. 82, 87, 88 [57 L.Ed. 1083, 1085, 33 S.Ct. 679]; *People v. California Fish Co.* (1913) 166 Cal. 576, 586-587, 598 [138 P. 79]). At bench, the Ballona Rancho grant was specifically made "without prejudice . . . to servitudes." Such a reservation, in my view, included a public trust easement in those portions of the grant which were tidal property, (*Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, 452-455 [36 L.Ed. 1018, 1042-1043, 10 S.Ct. 110]. . . .

I would affirm the judgment below on the basis of a public trust easement in tidewater property. *City of Los Angeles v. Venice Peninsula Properties,* 117 Cal.App.3d 335, 348-351.

Appendix K

Incline Village v. Nevada Complaint

Case No. 78-3191 Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Incline Village General Improvement District,
Plaintiff,

vs.

State of Nevada,
Defendant.

COMPLAINT

I

Plaintiff, Incline Village General Improvement District, sometimes referred to as "IVGID", is a general improvement district organized pursuant to NRS Chapter 318 and, as such, is a body corporate and politic and a quasi-municipal corporation. The Defendant, State of Nevada, sometimes referred to as "State", includes the Nevada State Division of Lands acting on behalf of the State of Nevada.

II

IVGID, located within the Lake Tahoe Basin of Washoe County, Nevada, was established by Washoe County Ordinance to promote the general welfare of its inhabitants in accord with the legislative determination of NRS 318.015:

318.015 Legislative declaration.

1. It is hereby declared as a matter of legislative determination that the organization of districts having the purposes, powers, rights, privileges and immunities provided in this chapter will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and of the State of Nevada; that the acquisition, improvement, maintenance and operation of any project authorized in this chapter is in the public interest and constitutes a part of the established and permanent policy of the State of Nevada; • • •

III

IVGID has the powers pursuant to NRS 318.143 to acquire, construct, reconstruct, improve, extend and better lands, works, systems and facilities for recreation.

IV

IVGID brings this action pursuant to the Uniform Declaratory Judgments Act NRS Chapter 30. In accord with NRCP Rule 57, Plaintiff is entitled to a speedy hearing on the issues herein, and the public interest would require such speedy hearing.

V

IVGID is the owner of Real property located in Washoe County, Nevada, bordering Lake Tahoe and known as Burnt Cedar and Incline Community Beaches described in the deed attached as exhibit A. In 1968 IVGID purchased and acquired fee title to Burnt Cedar and Incline Community Beaches bordering Lake Tahoe and to the edge of the water of the Lake for a purchase price of $2,100,000.

IVGID, in order to fund the purchase of such beaches and for certain improvements thereon, did issue and sell revenue bonds in the principal amount of $2,685,000 designated as Revenue Bonds of 1968. Ever since 1968 IVGID, in order to pay said revenue bonds and in order to improve and maintain said beach areas, has levied an annual charge of $50.00 for each residential lot. Unimproved acreage and properties such as motels have, likewise, contributed revenues levied annually.

VI

Since 1968 IVGID has expended substantial sums of monies for not only the purchase of said beaches but for maintenance, a boat ramp, landscaping, swimming pool improvements, recreational structures, fencing, grading, parking areas, security, lifeguards and other improvements and salary expenses. Such funds have been raised by the levy of an annual recreation charge against the IVGID property owners. That improvements such as a boat ramp have been approved by the State of Nevada as well as other regulatory agencies.

VII

That ever since 1968 IVGID has maintained, improved and used said beaches for its property owners, residents and their guests who have paid the substantial cost thereof. That thousands of property owners at IVGID have purchased properties ever since 1968 in reliance on IVGID's ownership of the said beaches bordering Lake Tahoe to the edge of the water.

VIII

Ever since 1968 IVGID has adopted and maintained rules for beach use in order to protect and provide for the fullest use and enjoyment of the beaches by the IVGID property owners, residents and their guests.

IX

Ever since 1968 thousands of IVGID property owners, residents and guests have annually utilized and enjoyed the beaches including the numerous improvements thereon to the edge of the waters of Lake Tahoe.

X

That at all times since 1968 IVGID has maintained the beaches and regulated the use thereof for the full exposed area of such beaches to the edge of the waters of Lake Tahoe.

XI

IVGID purchased the beaches, maintained and improved them and fully used them in reliance on their rights to the title, fee ownership and use thereof to the edge of the waters of Lake Tahoe. That at all times ever since 1968 IVGID has maintained the exclusive use and control of the beaches to the edge of the water of Lake Tahoe.

XII

From prior to the admission of Nevada as a State in 1864 to the present, Lake Tahoe was and is a navigable, non-tidal, inland water body.

XIII

At the time that Nevada became a State, the generally accepted natural rim level of Lake Tahoe was 6,223 feet in elevation, and the natural ordinary low water level at an estimated elevation below the natural rim of level of 6,223 feet in elevation. Thereafter, during the early 1900's, the United States Bureau of Reclamation caused to be constructed at Tahoe City where the Truckee River is, the sole outlet for Lake Tahoe, a dam. Such dam was to provide a means of artificially increasing the water storage and consequently the level of Lake Tahoe. Thereafter, lands abutting Lake Tahoe were artificially flooded and, over the years, the United States claimed an easement for flooding for water storage purposes to an artificial high Lake level of approximately 6,229.1 feet in elevation.

XIV

That in draught years such as at present the level of the Lake will recede to the natural rim level of approximately 6,223 feet in elevation or below. During wet years, the level of the Lake will be artificially increased by flooding to an artificial high level of approximately 6,229.1 feet in elevation or more. This difference represents several hundred feet or more of exposed beach areas at IVGID.

XV

That it is the claim of IVGID that it owns and has the right to maintain, control and use its beaches to the natural low level of the Lake to the edge of the waters of Lake Tahoe. That such claim is the law of Nevada. That such claim has been supported by at least three prior attorney

generals' opinions, AGO 59 (5/17/1951); AGO 63 (1/6/1970); AGO 133 (6/4/1973).

XVI

About April 20, 1976, the present attorney general of Nevada reversed his own established opinion and that of prior elected attorney generals of Nevada claiming, for the first time, that the State of Nevada now owns several hundred feet of exposed beach area of the Incline and Burnt Cedar beaches to the artificial high water level of approximately 6,229.1 feet in elevation. AGO 204 (4/20/1976). Said opinion bases its erroneous conclusion on the illogical reasoning that, where lands are artificially flooded on an inland navigable body of water without the property owners' consent, such artificial flooding by a third party gives the State of Nevada a right to claim ownership of the flooded area after the water recedes. That the Nevada Division of State Lands, in reliance of said erroneous opinion, now claims ownership of the beaches at IVGID on behalf of the State of Nevada to the artificial high water level of approximately 6,229.1 feet in elevation.

XVII

That the State of Nevada in 1977 enacted Senate Bill 153, being Chapter 529, Advance Sheets of Nevada Statutes, that enables the Division of State Lands to charge IVGID rental for any pier, breakwater or other structure extending into Lake Tahoe on State owned lands. IVGID has been advised and does believe and alleges on such information and belief that the Division of State Lands is proceeding to promulgate rules, regulations and fees on the

basis of the current attorney general's opinion (AGO 204 [4/20/1976]) that the State now owns that portion of the IVGID beaches to the artificially created high water flooding elevation of approximately 6,229.1 feet. IVGID alleges that such rules and regulations, if adopted, would result in the charging to IVGID by the State of rental charges for the use of IVGID's own beach property.

XVIII

An actual controversy has arisen and now exists between IVGID and the State with regard to the ownership of the IVGID beaches, their maintenance, use and control in that:

(a) IVGID contends that it is the owner and has the right to maintain, use and control its beaches to the edge of the waters of Lake Tahoe.

(b) IVGID contends that none of the property above the natural low water level of Lake Tahoe at the elevation of approximately 6,223 feet or below is subject to the State's ownership.

(c) IVGID contends that they have the right of access from every point on their property bordering Lake Tahoe to the water's edge, and that such rights are free from interference by the State or any member of the public, and the State may not charge any other fees or considerations for use of such property for those purposes.

(d) IVGID contends that, as a political subdivision of the State of Neavda and the owner of Burnt Cedar and Incline Community Beaches, it has the right, duty, au-

thority and obligation on behalf of the property owners, residents and guests of IVGID to reasonably maintain, control and regulate the use of the exposed beach area to the edge of the waters of Lake Tahoe.

(e) IVGID contends that the area of exposed beaches, the subject of controversy, is subject only to an easement for flooding acquired by the United States by prescription by reason of the artificial increasing and decreasing of the Lake level for water storage purposes over the years. That the State of Nevada has gained no rights to the property underlying such prescriptive easement for flooding claimed by the United States.

(f) IVGID contends that the State of Nevada by virtue of their words and conduct over many years are estopped to assert Nevada has any interest whatsoever in IVGID's property bordering Lake Tahoe. Such words and conduct include, but are not limited to:

(1) The publication by the attorney general of the State of Nevada of Opinion 59 dated May 17, 1951 and Opinion 632 dated January 6, 1970 which declare that the low water mark is the boundary of an inland waterway encouraging and authorizing IVGID and its predecessors in interest to purchase, improve and utilize the beach property at substantial expense.

(2) Taking no action for more than one hundred years to assert any claims in IVGID's beach property, knowing that Plaintiff and Plaintiff's predecessors in interest have relied upon the validity of their absolute title to such property unencumbered by any interests of the public or the State of Nevada.

(g) IVGID contends that Defendant is seeking to take IVGID's property without just compensation having first been paid in violation of Article I, Section 8, of the Nevada Constitution and Amendments V and XIV of the United States Constitution.

(h) IVGID contends that, if Defendant is successful in asserting either a state ownership or a public trust interest to the high water mark of Lake Tahoe, such claims deprive IVGID of their property without due process of law and deny Plaintiff equal protection of the laws in violation of Amendments V and XIV of the United States Constitution and Sections 1 and 8 of Article I of the Nevada Constitution.

(i) Plaintiff contends that the claims being asserted by Defendant is barred by the statute of limitations and by laches.

(j) IVGID contends that, even if the Defendant should be able to establish title in public trust to all or a portion of the exposed beaches of IVGID, nonetheless, IVGID, as a political entity of Nevada, being a Chapter 318 general improvement district, has the right to reasonably use, maintain and regulate such exposed area for the benefit of the IVGID property owners, IVGID residents and their guests subject to the reasonable exercise of police powers of the State of Nevada.

(k) IVGID contends that, if the court should determine that the Defendant owns in public trust the exposed beaches to the ordinary high water mark, the court declare such high water mark is the natural high water mark of

approximately 6,224 feet in elevation and not the artificially created high water mark of 6,229.1 feet in elevation.

Plaintiff is informed and believes that Defendant denies the contentions of subparagraphs (a) through (k) above.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. Plaintiff prays for a declaratory judgment declaring the rights of the parties with respect to the controversies set forth and for the court to declare Plaintiff's contentions correct.

2. Plaintiff prays for costs, disbursements, attorneys', appraisal and engineering fees as determined by the court.

3. Plaintiff prays that during the pendency of this action Defendant be restrained from interfering with the use of said beach areas.

4. For such other and further relief as the court deems proper.

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Petitioner's Reply Brief

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No. 81-182

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

VS.

STATE OF CALIFORNIA, et al.,
Respondents.

REPLY BRIEF OF PETITIONER

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No. 81-182

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

At the urging of Respondents, the California Supreme Court radically and abruptly departed from settled California law in ruling an extensive state servitude burdened Petitioners' lakefront property. Under more than a century of prior California law, Petitioners and their predecessors held fee simple absolute title to their property at Lake Tahoe, free of this servitude. Suddenly their property was opened to the public for recreational and other public uses. The court based this ruling on a nineteenth century United States Supreme Court case decided under Illinois law.

Incredibly, Respondents argue that the ruling presents no federal question. On the contrary, the ruling inflicts a great injustice on Petitioners, violates their constitutional rights and raises grave constitutional problems for us all. This Court has recognized the significance of the Fifth Amendment to our way of resolving disputes:

"Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just." (*Boddie v. Connecticut* (1971) 401 U.S. 371, 375.)

I

NO STATE GROUNDS SUPPORT IMPOSITION OF THE TIDELANDS TRUST ON PETITIONERS' PROPERTY

In its Brief in Opposition Respondents (State) argue that state grounds support imposition of the tidelands trust on Petitioners' property. Nothing in California law supports this contention.

The State relies on cases applying the tidelands trust to tidal waters and tidelands.[1] The tidelands trust is not in issue here. Rather, the issue is whether for the first time

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[1]The State attempts to obscure this fact. For example, the State quotes extensively from *Ward v. Mulford* (1867) 32 Cal. 365 (Brief in Opposition, page 7) but omits the sentence immediately preceding the quotation which confined the holding to tidelands: "The land which the State holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the neap of ordinary tides." (*Id* at 372.)

The following cases cited by the State also involved tidelands and tidal waters: *Boone v. Kingsbury* (1928) 206 Cal. 148; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515; *City of Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160; *Forestier v. Johnson* (1912) 164 Cal. 24; *Los Angeles Athletic Club v. City of Long Beach* (1932) 128 Cal.App. 427; *Martin v. Smith* (1960) 184 Cal.App.2d 571; *People v. California Fish Co.* (1913) 166 Cal. 576; *People ex rel. Pierce v. Morrill* (1864) 26 Cal. 336; *Taylor v. Underhill* (1871) 40 Cal. 471.

in California history this extensive servitude can now be applied to the shorezone of non-tidal waters.

Only four cases cited by the State involve inland waters. Two were considered and rejected by the lower court (*Packer v. Bird* (1886) 71 Cal. 134, aff'd 137 U.S. 661 (1891); *Churchill Co. v. Kingsbury* (1918) 178 Cal. 554; see *Lyon,* Tahoe Shorezone Representation (TSR) Appendix B-14—B-18).

The other two cases did not discuss public rights in the shorezone of inland waters (*People v. Gold Run D & M Co.* (1884) 66 Cal. 138; *Colberg v. State of California* (1967) 67 Cal.2d 408). *Gold Run* held that a grant of the soil underlying navigable waters was subject to the public right to navigate over the water. The Court affirmed an injunction restraining impairment of navigation by hydraulic mining debris. The public navigational servitude is not in issue in the instant case. (See TSR Petition, pp. 10-11, footnote 19.) *Gold Run* does not discuss, let alone determine, public rights in privately owned land.

In *Colberg v. State of California* (1967) 67 Cal.2d 408, the issue was the private owners' right of access to the waters, not public rights to the land.[2] Indeed, as the *Colberg* court explained:

> "[W]e emphasize that the state servitude upon lands riparian or littoral to navigable waters, like the federal servitude burdening such lands, does not extend to cases wherein the proper exercise of state power results in actual physical invasion of or encroachment upon fast lands." (*Id* at 424.)

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[2]Although *Colberg v. State of California* (1967) 67 Cal.2d 408, involved inland waters, the Court judicially noticed the tidal influence and described the channel as a *tidal* waterway. *Colberg* at 412, 423.

Far from furnishing state grounds for the court's ruling, *Colberg* supports Petitioners' position as a matter of state law. *Kaiser Aetna v. United States* (1979) 444 U.S. 164, supports Petitioners' position as a matter of constitutional law.

Imposition of this servitude, with no basis in California law, violates Petitioners' constitutional rights. (*Hughes v. Washington* (1967) 389 U.S. 290, 296-297 (Stewart, J. concurring); *Broad River Co. v. South Carolina* (1930) 281 U.S. 537, 540.)

II

THE RELIANCE OF THE LOWER COURT ON THE ILLINOIS CENTRAL CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION

After describing the tidelands trust, the lower court considered as a separate issue the applicability of this servitude to non-tidal waters. The court declined to accept the State's argument that imposition of the servitude was supported by California law. Rather, it held that *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, "settled the issue."

The State again argues that state grounds support imposition of the tidelands trust on Petitioners' land. The ruling cannot now be justified on grounds the court refused to accept. *United Air Lines v. Mahin* (1973) 410 U.S. 623, 630-631. Whether *Illinois Central* applies to this case presents a federal question.

III

IMPOSITION OF THE STATE SERVITUDE IS A TAKING AND VIOLATES PETITIONERS' CONSTITUTIONAL RIGHTS

The imposition of a servitude on private property without compensation violates the Constitution. *United States*

v. Dickinson (1947) 331 U.S. 745, 748. Here the State has acquired a servitude in Petitioners' land. *People v. California Fish Co.* (1913) 166 Cal. 576; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462; *Marks v. Whitney* (1971) 6 Cal.3d 251 (See TSR Petition, p. 3, footnote 3.) Therefore, Petitioners' rights to due process and just compensation have been violated.

The State attempts to blunt the impact of this servitude by citing cases decided prior to the expansion of the servitude by *Marks v. Whitney* (1971) 6 Cal.3d 251. The State suggests that this servitude merely gives the state power to abate nuisance and remove illegal obstructions impairing the public rights to commerce, navigation and fishing in the navigable waters. (State Brief in Opposition, pp. 5, 7, 14-15.) *Marks v. Whitney* rejected this traditional definition of this servitude and greatly expanded its scope. (TSR Petition 18-19, footnote 30.) The lower court approved *Marks v. Whitney*. (TSR Appendix, B-26.)

Petitioners submit that imposition of the traditional servitude for commerce, navigation and fishing violates their constitutional rights. The taking is even more onerous in view of the expanded public uses approved by the lower court.

The State seems to suggest that this Petition is premature because Petitioners have not submitted development plans, citing *Agins v. City of Tiburon* (1980) 447 U.S. 255. (Brief in Opposition, pp. 6, 16.)

The issue here is not possible future restrictions on Petitioners' use of their property as in *Agins,* but the immediate affirmative use of Petitioners' property by the State as in *Kaiser Aetna v. United States* (1979) 444 U.S. 164. Most of the Petitioners simply wish to maintain the privacy and security of their homes. The state servitude opens Petitioners' land to public use, deprives them of their right

to exclude others and imposes burdens on them which should be borne by the public.

The fundamental constitutional character of rights in property was reaffirmed in *Lynch v. Household Finance Corp.* (1972) 405 U.S. 538, 552:

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have any meaning without the other. That rights in property are basic civil liberties has long been recognized."

Respectfully submitted,

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